

15-Eg
Modern Reports:

O R,

C A S E S

I N

Law and Equity,

CHIEFLY DURING THE

Time the late Earl of MACCLESFIELD
presided in the Courts of King's Bench
and Chancery, viz.

FROM THE

Eighth of QUEEN ANNE, to the Eleventh of KING GEORGE
the First inclusive.

By ROBERT LUCAS of the Inner Temple, Esq;

V O L. X.

The SECOND EDITION.

L O N D O N :

Printed by His Majesty's Law-Printers ;
And sold by J. WORRALL and B. TOVEY, at the Dove in Bell-Yard,
near Lincoln's Inn.
M DCC LXIX.

17

Modern Reports:

CP RA 25 E 2

T
The following is a list of the
names of the persons who have
been employed in the
office of the
Commissioner of the
General Land Office
since the late
MacClesfield
and Company
predecessors in
the office of the
Commissioner of the
General Land Office



THOMAS
The following is a list of the
names of the persons who have
been employed in the
office of the
Commissioner of the
General Land Office
since the late
MacClesfield
and Company
predecessors in
the office of the
Commissioner of the
General Land Office

T H E
P R E F A C E.

TH E following Papers were at first, only designed for private Use ; but as the Author has, for several Years last past, been settled in a remote Part of the Kingdom, he thought, he could not employ some leasure Hours more serviceably to his Country, than in publishing the best Part of his Notes, for the publick Benefit.

The Reader will no doubt observe, that they consist of a variety of remarkable Cases, few of which are to be found extant in other REPORTS.

The Author can with great Assurance acquaint the Reader, that in every Thing here published, he has given him the Sense, though not the Words of both Bar and Bench.

L A W

LAW BOOKS lately Published.

FOLIO.

Bacon's Abridgment, 5 vols.
 Comyns's Digest, 5 vols.
 Cases in Equity abridged, 2 vols.
 Cay's Statutes at Large, 6 vols. The seventh and eighth volumes are in the press.
 Cay's Abridgment of the Statutes, 2 vols. 1762.
 Horsman's Precedents in Conveyancing, 2 vols.
 Hawkins's Pleas of the Crown.
 Shower's Cases in Parliament.
 Treatise and Maxims of Equity, 2 parts.
 Viner's Abridgment of Law and Equity, 24 vols. Also such odd volumes to complete sets as are not out of print.
 Wood's Body of Conveyancing, 3 vols.
 Watson's Clergyman's law.
 Atkyns's Reports in Chancery, time of Lord Hardwicke, 3 vols.
 Andrew's Reports in the King's Bench.
 Burrow's Reports, time Lord Mansfield, 3 vols.
 Bunbury's Reports in the Exchequer.
 Barnardiston's Reports in King's Bench and Chancery, 3 vols.
 Carthew's Reports in the King's Bench.
 Foster's Reports of Crown Cases.
 Freeman's Reports in Law and Equity.
 Fortescue's Reports in all the Courts.
 Fitzgibbon's Reports ditto.
 Gilbert's Reports in Chancery and Exchequer.
 Holt's Reports.
 Jenkins's Eight Centuries of Reports, 3d Edition.
 Kelyng's (Sir John) Reports of Crown Cases.
 Kelynge's (William) Reports in Chancery and King's Bench.
 Modern Reports in all the Courts (as cited by Viner), 12 parts.
 Mosely's Reports in Chancery, time of Lord King.
 Plowden's Commentaries in English.
 Raymond's (Lord) Reports, 3 vols. Third volume sold separate.
 Raymond's (Sir Thomas) Reports in the King's Bench, Common Pleas and Exchequer.
 Select Cases in Chancery, time of Lord King.
 Strange's (Sir John) Reports in the King's Bench and Chancery, 2 vols.
 Skinner's Reports in the King's Bench.
 Vernon's Reports in Chancery, 2 vols.
 William's (Peere) Reports ditto, 3 vols. Third volume to be had separate.
 Yelverton's Reports of Special Cases in the King's Bench, in English.

QUARTO.

Ancient Dialogue of the Exchequer, translated from Madox.

4

Burrow's Settlement Cases, 2 vols.
 Blackstone's Commentaries, 4 vols.
 Barrington's Observations on the Ancient Statutes.
 Fitzherbert's Natura Brevium, English.
 Harris's Institutes of Justinian.
 North's Lives and Examen, 2 vols.
 Pigot's Treatise of Common Recoveries, new Edition.
 Ruffhead's Statutes at Large, 10 vols. The tenth volume sold separate.

OCTAVO, &c.

Atkyns's Parliamentary Tracts.
 Attorney's Practice in the King's Bench, and Common Pleas, 4 vols.
 Attorney's Practice in all the Courts, Epitomized, 4 parts.
 Boote's Treatise of an Action, or Suit at Law.
 Burton's Office of Pleas in Lincoln's Inn.
 Bacon's Law Tracts.
 Compleat Arbitrator, or the Law of Awards.
 Crown Circuit Companion.
 Coke's Law Tracts.
 Compleat System of the Laws concerning Bankrupts.
 Clarke's Practice of the Admiralty.
 Customs and Privileges of Stepney and Hackney.
 Compleat Jurymen.
 Doctor and Student.
 Exton's Sea Laws.
 Finche's Law, by D. Pickering, Esq;
 Hale's Summary of the Pleas of the Crown.
 Hawkins's Abridgment of Coke.
 Harvey, and Higgs's Precedents for Justices.
 Jacob's Accomplished Conveyancer, 3 vols.
 Lex Parliamentaria.
 Law of Attornies and Solicitors, with the Statutes and adjudged Cases concerning them.
 Mildway's Proceedings on Elections in the City of London.
 Noy's Maxims of the Law.
 Practical Register in the Common Pleas.
 Perkins on the Various Branches of Conveyancing.
 Principia Legis, being a Collection of 2000 Maxims in Law and Equity.
 Solicitor's Guide, or Tradesman's Instructor, concerning Bankrupts.
 Sessions Cases in the Court of King's Bench, 2 vols.
 Table of Fees of the several Courts.
 Under Sheriff.
 Wentworth's Office of Executors.

NAMES

NAMES of the CASES.

The Cases named without the Addition of the Court, where they were determined, are in *B. R.*

A.

* A BINGTON corporation, their case,	Page 56
Abrahat <i>versus</i> Brandon,	200
African Company <i>v.</i> Mason,	227
* Alexander <i>v.</i> Symonds,	285
Ambassador of <i>Muscovy's</i> Case,	4
Anonymus, bastard children,	84
—— Custom of <i>London</i> ,	6
—— Writ <i>de Excom. cap.</i>	71
—— <i>Habeas Corpus</i> act,	429
—— Perpetual injunction, <i>in Canc.</i>	1
—— Motion to take a bill <i>pro confesso</i> , <i>in Canc.</i>	431
—— Order of Justices,	84
—— <i>Sci. fa.</i> upon a recognizance,	443
—— Or Goodwin <i>v.</i> Godwin,	16
—— <i>v.</i> Hereford county,	334
—— <i>v.</i> Ormston,	286
—— <i>v.</i> Powell, <i>in Canc.</i>	398
—— <i>v.</i> Sands, Admiralty,	79
—— and Stationers Company,	105
Arne <i>v.</i> Johnson,	111
* Arundel <i>v.</i> Philpot, <i>in Canc.</i>	476,
	478

VOL. X.

Asgil <i>versus</i> Hunt,	Page 439
Affievedo <i>v.</i> Cambridge,	77
Atcherly <i>v.</i> Vernon & al' <i>in Canc.</i>	518
* Athorpe <i>v.</i> Jones,	331
Atkin <i>v.</i> Berwick,	432
* Atkins <i>v.</i> Waterston, <i>in Canc.</i>	457
Aubry <i>v.</i> Fortescue,	205
Aylwood <i>v.</i> Woolley,	285

B.

Backhouse <i>v.</i> Wells,	181
Baldwin <i>v.</i> Church,	323
Ball <i>v.</i> Rumball,	38
Banbury corporation	346
Banister <i>v.</i> Hopton,	12
Banneaux <i>v.</i> Plaftead,	340
Barnardiston <i>v.</i> Foullyer,	204
Bath (Earl of) <i>v.</i> Sherwin, (or anony- mus) <i>in Canc.</i>	1
* Beaumont's case,	412
Betts <i>v.</i> Mitchel,	315
Bewdley corporation,	151
Bishop <i>v.</i> Eagle,	22
Blundell <i>v.</i> Barker, <i>in Canc.</i>	451
Bows (Dr.) <i>v.</i> Jurat.	440
Bret <i>v.</i> Ridgen,	370
Brightwell <i>v.</i> Henley (parishes)	287

a

Brown

Names of the Cases.

Brown v. Litton, <i>in Canc.</i>	Page 20	Fazakerley (Chamberlain of London) v. Wiltshire,	Page 338
Buckley <i>versus</i> Pirk,	12	Forte v. Buviere,	113
Burgh v. Blunt,	349	* Foster v. Mount, <i>in Canc.</i>	400, 443
Butler v. Duncomb, <i>in Canc.</i>	433	Fowk v. Edwin,	256
C.		Frencham <i>versus</i> Pepperharrow (parishes)	293
Cambridge University, their case,	125	* Fuller v. Davis,	285
Cambridge University v. Archbishop of York,	207	G.	
Cattington v. Warren,	334	Gibson v. Albert, <i>in Canc.</i>	19
Cartwright v. Cartwright, <i>in Canc.</i>	314	Gier v. Offiter,	34
Champney v. Champney, <i>in Canc.</i>	512	* Goldsmith v. Butting, <i>in Canc.</i>	448
Chaplain v. Southgate,	383	Goodwin v. Godwin,	16
* Chauncy's case, <i>in Canc.</i>	398	Gore v. Gore, <i>in Canc.</i>	501
Child v. Pierce,	330	Grosvenor v. Stephens,	166
Clare v. Acmobry,	455	H.	
Clerk v. Elwick,	332	Hacket v. Glover,	142
Clerk v. Lee,	261	Hadley v. Styles,	7
* Clerk v. Ward, <i>in Canc.</i>	43	Hallifax v. Overton (parishes)	221
* Clifford (Lady) v. Earl of Burlington, <i>in Canc.</i>	479	* Halfey v. Carpenter,	329
Cock v. Goodfellow, <i>in Canc.</i>	489	Hamilton (Dutchess) her case (<i>alias</i> Thornby v. Fleetwood) C. B.	113
Cole v. Hawkins,	251	The same upon error,	356, 496
Cook v. Dutchess of Hamilton,	367	* Hamilton (Duke) v. Lord Mohun, <i>in Canc.</i>	284
Cook v. Parsons,	15	Hammond v. Webb, <i>clerk</i>	281
Cottingham v. Lofts,	272	Hancock v. Hancock (bond fraudulently obtained) <i>in Canc.</i>	438
Coventry (Countess Dowager) v. Earl of Coventry and Lady Anne Carew, <i>in Canc.</i>	463	* Hancock v. Hancock (custom of London) <i>in Canc.</i>	454
D.		* Hanger v. Eyles, <i>in Canc.</i>	503
D'aeth v. Baux,	63	Harrison (Dr.) v. Archbishop of Dublin,	68
* Deniel v. Upton,	33	Harrison v. Thornborough,	196
Darcy v. Allen,	106	Harvey of Comb's case,	334
* Dean v. Crane,	313	Harvey v. Wright,	40
Doucett v. Chaplin,	318	Hayson & al' v. Jeffreys,	280
Dummer v. —,	67	Heathcote's (Sir Gilbert) case,	48
E.		* Heylin v. Huskins,	314
Earle v. Peale,	66	* Hicks v. Cockum,	331
* Ellis v. Warner,	449	* Hicks v. Phillips, <i>in Canc.</i>	504
F.		Hill v. Filkins & ux' <i>in Canc.</i>	481, 536
* Farrington's case,	102	Hobson & ux' v. Trevor, <i>in Canc.</i>	507
Farrington v. Knightly, <i>in Canc.</i>	442	Holroi v. Ebizson,	274
		Honiton	

Names of the Cases.

Horton *versus* St. Mary Axe (parishes)

Page 9

Horton parish v. — 392

Huet v. Bainard, 390

Hulm v. Saunders, 69

Hurtion *versus* Aglionby, 326

J.

Jackson v. Laveright, 184

Jeffry v. Barrow, 18

Inchley v. Robinson, 525

Johnson v. Alkham, 192, 210

Johnson v. Gardiner, 254

Johnson v. Louth, 346

* Joliffe v. Brode, 132, 135

Jones v. Gwynn, 148, 214

Josselyn v. Lacier, 294, 316

K.

* Kemp v. Coleman, *in Canc.* 447

* Kettle v. Townsend, *in Canc.* 471

Burcleer parish, 430

Bury-Pontroi inhabitants, 279

Dixon & ux, 335

Dorrel, 321

Gully, 307

Hammond, 382

* Larwood, 101

Bishop of Meath & al, 308

Miles, 271

Theed, 350

Tomb, 278

Weston, 279

* Kingsman v. Kinsman, *in Canc.* 404

Kitson v. Fag, 288

L.

* Lamlee v. Hayman & ux, *in Canc.* 448

Landdown's (Lord) case, 96

Le-Croy v. Eastman, *in Canc.* 498

Leeds v. Carlton, 319

Lewis v. Lord Lechmere, *in Canc.* 503

Lingen v. Souroy (or Shorer v. Shorer)

in Canc. 39, 528

* Littlebury v. Buckley, *in Canc.* 99,

400

Louviere v. Laubray,

Page 36

Lure v. Rest,

30

M.

Manners v. Pern,

156

Marks v. Marks, *in Canc.*

419

St. Mary v. St. Lawrence (parishes in

Reading,)

13

Merryl v. Josselyn,

147

Miles v. Williams,

160, 243

Mills v. Eden, *in Canc.*

487

Mitchell v. Reynolds,

27, 85, 130

* Molineaux v. Molineaux,

799

Monk v. Clayton,

119

* Moor v. Finch, C. B.

327

Muston v. Yateman,

228, 300

N.

Nab v. Nab, *in Canc.*

404

Newark v. Worksworth (parishes)

272

Nickson v. Brohan, *Nisi prius*,

100

* Northampton parishes,

9

Nutton v. Crow (assumpsit)

170

Nutton v. Crow (writ of error quash-

ed) 183

O.

Ongly v. Peed,

103

* Onions v. Tyret, *in Canc.*

167

* Orby (Sir Charles) v. Lord Mohun,

473, 178

in Canc.

Ormston,

286

Osgood v. Stroud, *in Canc.*

533

Otway v. Bristow,

37

Overton v. Steepleton (parishes)

392

P.

Parker v. Crook,

255

Parker v. Langly,

145, 209

Parker v. Lilly,

102

* Parker v. Parker, *in Canc.*

467

Parks v. Crawford,

394

Parks v. Wilson, *in Canc.*

515

Pawlet v. Burnham (parishes)

261

* Beach v. Winchelsea, *in Canc.* 468

Petworth

Names of the Cases.

Petworth Parish,	Page 25
* Peyton <i>versus</i> Blaidwell, in <i>Canc.</i>	448
* Phillips and Hicks, in <i>Canc.</i>	504
* Philpot and Arundel, in <i>Canc.</i>	476, 478
Physicians (College of) v. Dr. West,	353
* Piggot v. Penrice, in <i>Canc.</i>	473, 478
Player v. Bandy,	26
Potter v. Pinkney,	265
Powell and ——— in <i>Canc.</i>	398
* Prideaux v. Gibbon, in <i>Canc.</i>	529

Q.

Aires,	258, 354
Aldborough (borough of)	100
Blagden,	211, 296
Bradley,	155
Buckingham corporation,	173, 178
* Cook & ux',	63
Delme,	198
Doughton,	81
Dunn,	221
Durham corporation,	146
* Good,	187
Green,	212
Gruelthorp inhabitants	157
Hornsey inhabitants,	50
Lycassell,	187
Manchester inhabitants,	220
Matthews,	26
Morgan,	70
Muscor,	192
Pomfret corporation,	107
Ridpath,	152
Simpson,	248, 341
* Soley (or Good)	187
Stafford,	188
Sutton,	74
Whitehorn (Mayor of Portsmouth)	64

The Queen *versus*

The Queen { Williams,	Page 63
{ Wooton,	68
{ * Wrightson,	186

R.

Radcliffe v. Roper, in <i>Canc.</i>	89
Rawlinson v. Rawlinson,	455
Reeves v. Symonds, <i>Nisi prius</i> ,	291
Rench v. Britton,	327
* Rider v. Broderick,	285
Rogers v. Wood,	87
Roper v. Radcliffe, <i>House of Lords</i> ,	230
Rush v. Seymour,	88

S.

Sadler v. Daniel,	21
Sail v. Kitchingham,	158
Savil & ux' v. Kirby,	384
Sawkill v. Warman,	104
Say and Seal's (Lord) case,	40
Sestern v. Cibber,	190
Seymour's (Sir Edward) case,	8
Sheppherd v. Maidstone,	144
Shibly v. Shibly,	225
Shorer v. Shorer, in <i>Canc.</i>	39
Shuttleworth v. Patterson,	270
Silk v. Hill,	82
Skinner v. Newton,	140
Slingsby v. ——— in <i>Canc.</i>	397
* Sloan v. Fowler, in <i>Canc.</i>	448
* Smith v. Ashton, in <i>Canc.</i>	467, 471, 477, 478
Smith v. Parks,	383
South-Sidenham v. Lamerton (parishes)	388
Stafford v. Beneath,	69
Stafford v. Forcer,	311
Stationers Company v. ———	105
Stationers Company v. Gale, in <i>Canc.</i>	107
Stationers Company v. Skinner,	107
Stationers Company v. Wright, <i>ibid.</i>	
Stennil v. Brown, <i>Nisi prius</i> ,	108
Stone v. Taverner,	329
* Strode	

Names of the Cases.

* *Strode (Sir Litton) versus Lady Falkland, in Canc.* Page 98

V.

* *Vachel versus Vachel, in Canc.* Page 524
Vavafor v. Crofts, 207
Vincent v. Atwood, 256
Uphill v. Halfey, in Canc. 441

W.

Walter v. Laughton 253
Walter v. Warren, 273
 * *Ward v. Evans,* 107, 108
Ware Inhabitants, 104
 * *Weale v. Lower, in Canc.* 476, 478
Weddal v. Manueaptors of Jocar, 276
Weltale v. Glover, 166
Westham Inhabitants, 159
Whetherborn v. Wright, 24
Whitlock v. Squire, 81
Widdrington v. Charleton, 86
Willis v. Lucas, in Canc. 416
Wilson v. Fielding, in Canc. 426
 * *Woodier v. Greenhill, in Canc.* 528
Woodright v. Wright, 369

T.
Target v. Grant, in Canc. 402
 * *Tawney's case,* 104
Taylor v. Matthews, 325
 * *Taylor v. Wheeler, in Canc.* 492
Temple v. Welds, 315
Templeman v. Case, 24
Thomlinson v. Dighton, 31, 71
 * *Thompson v. Harvey,* 28
Thornby v. Fleetwood, C. B. 113
Thornby v. Fleetwood (error) 356, 406
Thornicraft v. Barns, 149
 * *Thorold v. Smith,* 108
 * *Thynn of Egham's case, in Canc.* 516
Timber v. Gardiner, 224
Travanion's case, 98
Trevor's (Sir John) marriage settlement, in Canc. 436
Turner v. Goodwin, 153, 189, 222
Turton v. Benson, in Canc. 445
 * *Tyler's case,* 376

232A0

1000

1001

1002

1003

1004

1005

1006

1007

1008

1009

1010

1011

1012

1013

1014

1015

1016

1017

1018

1019

1020

1021

1022

1023

1024

1025

1026

1027

1028

1029

1030

1031

1032

1033

1034

1035

1036

1037

1038

1039

1040

1041

1042

1043

1044

1045

1046

1047

1048

1049

1050

1051

1052

1053

1054

1055

1056

1057

1058

1059

1060

1061

1062

1063

1064

1065

1066

1067

1068

1069

1070

1071

1072

1073

1074

1075

1076

1077

1078

1079

1080

1081

1082

1083

1084

1085

1086

1087

1088

1089

1090

1091

1092

1093

1094

1095

1096

1097

1098

1099

1100

1101

1102

1103

1104

1105

1106

1107

1108

1109

1110

1111

1112

1113

1114

1115

1116

1117

1118

1119

1120

1121

1122

1123

1124

1125

1126

1127

1128

1129

1130

1131

1132

1133

1134

1135

1136

1137

1138

1139

1140

1141

1142

1143

1144

1145

1146

1147

1148

1149

1150

1151

1152

1153

1154

1155

1156

1157

1158

1159

1160

1161

1162

1163

1164

1165

1166

1167

1168

1169

1170

1171

1172

1173

1174

1175

1176

1177

1178

1179

1180

1181

1182

1183

1184

1185

1186

1187

1188

1189

1190

1191

1192

1193

1194

1195

1196

1197

1198

1199

1200

1201

1202

1203

1204

1205

1206

1207

1208

1209

1210

1211

1212

1213

1214

1215

1216

1217

1218

1219

1220

1221

1222

1223

1224

1225

1226

1227

1228

1229

1230

1231

1232

1233

1234

1235

1236

1237

1238

1239

1240

1241

1242

1243

1244

1245

1246

1247

1248

1249

1250

1251

1252

1253

1254

1255

1256

1257

1258

1259

1260

1261

1262

1263

1264

1265

1266

1267

1268

1269

1270

1271

1272

1273

1274

1275

1276

1277

1278

1279

1280

1281

1282

1283

1284

1285

1286

1287

1288

1289

1290

1291

1292

1293

1294

1295

1296

1297

1298

1299

1300

1301

1302

1303

1304

1305

1306

1307

1308

1309

1310

1311

1312

1313

1314

1315

1316

1317

1318

1319

1320

1321

1322

1323

1324

1325

1326

1327

1328

1329

1330

1331

1332

1333

1334

1335

1336

1337

1338

1339

1340

1341

1342

1343

1344

1345

1346

1347

1348

1349

1350

1351

1352

1353

1354

1355

1356

1357

1358

1359

1360

1361

1362

1363

1364

1365

1366

1367

1368

1369

1370

1371

1372

1373

1374

1375

1376

1377

1378

1379

1380

1381

1382

1383

1384

1385

1386

1387

1388

1389

1390

1391

1392

1393

1394

1395

1396

1397

1398

1399

1400

1401

1402

1403

1404

1405

1406

1407

1408

1409

1410

1411

1412

1413

1414

1415

1416

1417

1418

1419

1420

1421

1422

1423

1424

1425

1426

1427

1428

1429

1430

1431

1432

1433

1434

1435

1436

1437

1438

1439

1440

1441

1442

1443

1444

1445

1446

1447

1448

1449

1450

1451

1452

1453

1454

Trinity Term

8 Annæ. In Chancery.

Earl of Bath *versus* Sherwin.

THE case before the court was, a vexatious person having Gilb. Rep. in Equity p. 2. tried his right in an ejectment at law five several times, the court of Chancery was moved for a perpetual injunction to stop all further proceedings at law.

Lord *Cowper* of opinion it could not be granted.

The jurisdiction of the court of Chancery, is generally divided Jurisdiction of Chancery. Division of it. into three parts, *fraud, trust and accident*.

It is plain the court has not a power to do what is desired in virtue of the two first branches of its jurisdiction; nor can it, I think, under the last; for by *accident* is meant when a case is distinguished from others of the like nature by *unusual circumstances*. For the court of Chancery cannot controul the maxims of common law, because of general inconveniencies; but only when the observation of a rule is attended with some unusual and particular circumstances that create a personal and particular inconvenience. Chancery cannot over-rule maxims of common law.

* This now is the case before the court; for it is a known maxim * P. 2. of the common law, that a man may try his title as often as he pleases in an ejectment. Now for this court to determine that one, two, three or more unsuccessful trials by ejectment, should be peremptory, *quid aliud* than to assume a legislative power, and alter the maxims of common law. Maxim of common law, that a man may try his right by ejectment as often as he pleases.

But it may be objected, this is sometimes done; for is not the penalty of a bond due by law, in case of non-payment of the money upon the day? And yet this court decrees not only upon extraordinary cases, where the payment of the money at the time appointed, by reason of some accident or misfortune, was become difficult, or impossible, but even in all cases, where the obligor might have complied with the condition, that the penalty is not forfeited. Objection 1.

But to this it may be answered, that the court in this conduct is Answer. sure of doing justice with an unerring hand, and in all events; for the court never saves the obligor from the penalty of the bond; be-

Trinity Term 8 Ann.

fore he has made a full satisfaction to the obligee, both in respect to principal, interest and costs.

But now should the court decree, that two, three or more unsuccessful trials by ejectment should be peremptory, the court would be very far from doing justice in all events. For proceedings at common law, are tied up to very strict rules, and a man that has a very good title may be cast through some slip in the proceedings, or a man may have better evidence at one time than another. Besides, as often as the plaintiff loses in an ejectment, the court gives costs, which is by law intended as a recompence, and though where fees are liberally given, it does not near come up to it, yet if things were managed more frugally, it would come much nearer.

* P. 3.
Objection 2.

* *Objection 2.* Where the court of Chancery directs two trials by ejectment, and the plaintiff is cast in both, this is peremptory; and what difference is there between trials at common law by ejectment directed out of Chancery, and those not directed?

Answer.

Answer. Where trials are directed by court, the court has a previous knowledge of the evidence, and so the court can the better judge. Certainly it does not follow, that because in trials relating to causes originally belonging to the jurisdiction of this court, and which are directed to be tried at law by this court, that because in these cases the court determines how many trials shall be peremptory, that therefore this court may grant a perpetual injunction to proceedings at law, in matters triable at law and not in equity, and that only for doing what the law allows.

But after all, the very ground of this objection fails; for even in cases of ejectments directed by this court, two unsuccessful trials are not so peremptory, but that upon good causes another may be granted, which strengthens the reason of the common law.

Objection 3.

* *Objection 3.* *Boni est judicis ampliare legem.*

Answer.

Answer. This maxim not to be understood as that a judge in equity should alter the maxims of the common law, for this would be to assume a power *paramount* to the law. The utmost that can be meant by this maxim, if it has any meaning in it, is, that this court, provided it has the law to justify it, should sometimes usurp upon the jurisdiction of the courts at law.—If this court should extend its jurisdiction in this point, it might by parity of reason extend it in other points, *viz.* determine how often distresses should be taken.—A collateral warranty was certainly one of the harshest and most cruel points of the common * law, because there was not so much as an intended recompence, yet I do not find this court ever gave relief in it. Should I have been inclined to enlarge the jurisdiction of the court, I think it extremely difficult to fix any standing rule in this case.

* P. 4.

Trinity Term 8 Ann.

Case of Andrew Artemonowitz Mattueof, Ambassador
of Muscovy. B. R.

THE question was, whether an ambassador could by law be arrested for debt. *sec. 1. Blackst. Canon. 255. an act of this same case, & the stat. of 7. Ann. ch. 12.*

Sir James Mountague, Attorney General,

He cannot. If the privileges of an ambassador may be broken in upon and invaded for the preservation of the property of a private subject, and this is declared to be law, princes will be cautious of sending ambassadors to us; ours must expect the like treatment, and few will be prevailed with to take that character upon them.

Should an ambassador be liable to the restraints of the law of the land to which he goes, how easy would it be upon an emergency, to take off his attendance upon his master's business?

Does the law of England privilege the body of a member of parliament, and of a soldier, and shall it not that of an ambassador?

The person of an ambassador has ever been held sacred and inviolable, by the law of nations.

The goods of an ambassador not liable to distress, *a fortiori*, not his person. An ambassador must be intreated, and upon refusal sent back to his master. If an ambassador commits a crime of a transcendent nature, the King *a quo, non ad quem* must punish him.

My Lord Coke says, *legatos violari contra jus gentium*; nor does he add (as certainly he would, had he thought so,) that though this be so in the civil law, it is not so in ours.

* An ambassador does by fiction of law represent the person of his master: Thus Coke, upon *stat. 25 Ed. 3.* affirms it high treason at the common law to kill an ambassador. Now certainly no body will say the Czar himself might have been arrested. The same fiction of law that makes him represent the person of his master, makes him *extraparochial*, & *quasi* in the dominions of his master. The ill treatment of ambassadors is a thing of a dangerous consequence, for it may involve the nation in a war, and it would be very inconvenient that this should be in the power of any private person whatsoever.

Contra, it was said. If this be so, a subject may be left without remedy for the recovery of his debt, which would be a defect in law.

Justice ought always to be reciprocal, but an ambassador may arrest. *Ergo, &c.*

It is a maxim in law, that the royal prerogative does no wrong, and shall the prerogative of an ambassador surmount that of the crown?

Such

Whether he
may be arrest-
ed for debt.

* P. 5.
High treason
to kill an am-
bassador.

Maxim of
law, King
can do no
wrong.

Trinity Term 8 Ann.

Such a law as this would be a nullity, because contrary to *magna charta*, cap. 29. *Nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.*

An ambassador by his contract renounces his privilege as far as to subject himself to the laws in force in that country where the contract was made.

This suit occasioned an act of parliament, 7 *Annæ*, cap. 12. whereby all proceedings against this ambassador in this cause were null and void, and the privileges of ambassadors fully settled as to this matter.

* P. 6.

* Michaelmas Term

8 *Annæ*. B. R.

Anonymous.

Custom of
London.

BY a return to an *babeas corpus*, it appeared, that in the city of *London*, there was such a custom, that if a feme covert exercises any trade in which her husband does not at all concern himself (*intromitteret*) she may be sued as a feme sole, for debts contracted in the carrying on of that trade; and if she has not goods that are not her husband's, she must be imprisoned until she pay them; and as she may be sued, so she may sue as a feme sole for debts owing her, in her way of trade, and within the city. She has a special and separate interest in the profit of her trade, or else it were an unreasonable custom.

* Hilary

* Hilary Term

* P. 7.

8 Annæ. B. R.

Hadley and Styles.

IN a writ of error upon a judgment in the court of Common Pleas, the error insisted upon was this, an action of debt was brought, and the jury found for the plaintiff as to part, and for the defendant as to the rest. Now it was objected this verdict was naught, because a debt is an intire thing; and upon a *nil debet* the jury cannot sever; and should a man bring an action of debt for 80 pounds, and declare for less, this would be a variance between the writ and the count, unless he shew how the rest was satisfied.

Salk. 664.
S. C.
Debt.
Not so intire
but jury may
sever in their
verdict, and
find part for
the plaintiff,
part for the
defendant.

This the court agreed to, but yet were of opinion, that if the party brought an action for the whole debt, and a part of it was paid, the jury might, upon a *nil debet* sever, as in case of rent. *Adjournatur. Vide this case, Salk. Rep. 664.*

* Easter Term

* P. 8.

9 Annæ. B. R.

Sir Edward Seymour's case.

IN a trial of ejectment between Sir *Edward Seymour* and his mother-in-law, the court did allow the contents of a deed to be given in evidence, by witnesses; nay witnesses who put the contents of the deed in writing upon memory, four or five days after reading the deed.

Easter Term 9 Ann.

The court seemed of opinion, that in case a deed was lost by some inevitable accident, that there it might be proved by a copy. But in case there was no copy, the contents of it could not be proved from the memory of those that knew the deed; and though it were hard for a man that had no copy, to lose the benefit of his deed, yet the inconveniencies of admitting that sort of evidence would be greater.

But here the opinion of the court was founded upon a particular reason, for the deed by which the plaintiff was to prove his title, was not lost, but proved to be in the hands of the defendant; so that in this case the danger of allowing this sort of evidence was none at all; for if the defendant was wronged by the parol evidence, it was in his power to set all right by producing the deed.

* P. 9.

* Trinity Term

9 Annæ. B. R.

Anonymus, or Parishes of Honiton and St. Mary Axe.

Comb. 401.
Set. and Rem.
189.

A. Is sent from the parish of *H.* to the parish of *C.* with a certificate, subscribed by the churchwardens of *H.* and two justices of the peace; whereby at the time of his removal he is acknowledged a settled inhabitant of the parish of *H.* *A.* grows chargeable to the parish of *C.* who by virtue of that certificate send him back to *H.*

Settlement by certificate is an estoppel upon the parish granting the same, from finding any other settlement against the whole world.

Vide 2 Salk.
530.

The question was, whether this certificate of the parish of *H.* shall not be a conclusion or an estoppel to the parish of *H.* from saying that his last settlement was at some other parish; not only with respect to *C.* (for of that there was no doubt) but with respect to any other parish whatsoever.

Reasons urged why this certificate should be an estoppel only with respect to the parish of *C.* were,

1st, And especially a case of two parishes in the town of *Northampton*, 2 *Annæ*, where, upon an order removed by *certiorari* into *B. R.* this very question was so determined.

* 2dly,

Trinity Term 9 Ann.

* 2dly, Upon supposition that this certificate was to be esteemed * P. 10.
an estoppel, from finding out any settlement whatsoever, it will make
churchwardens very cautious of putting their hands to such certifi-
cates, which will in a great measure prevent the benefit of the act. 8 & 9 W. 3.

3dly, Not reasonable the indemnification should extend farther
than the damnification; if therefore the parish of C. that is the only
parish damnified, be indemnified, this is enough.

4thly, No injury is done to any one by this interpretation of the
act, for if the third parish to whom he is sent, can shew that he
had not his last settlement there, then all things are in *statu quo*;
but if the truth is, that he was really settled there, then that parish
ought to provide for him. But taking the law to be the other way,
viz. that according to the meaning of the act, the certificate is a
conclusion from finding any settlement in any parish whatever, the
parish granting it may be obliged to maintain him in their own
wrong.

5thly, Not fit it should be in the power of churchwardens to pre-
judice the parish in matter of property.

6thly, The statute mentions the two parishes only.

Arguments for the other side of the question;

1st, Expedient, or not expedient, no good argument against the
express letter of a law.

The parliament never supposed, that the churchwardens and
justices of the peace would certify a falsehood; and therefore the act
says, that the certificate shall oblige the parish that gives it, to re-
ceive and provide for, &c. when he becomes chargeable; but ac-
cording to this construction the parish is not obliged, &c.

As to what was said, that this would make people cautious of
granting certificates, it may be answered, that the easing the parish
for a time, and it may be for ever, will be motive enough.

* The statute of the 3d of King William says, that the paying of * P. 11.
taxes shall make a settlement; if therefore he pay taxes at C. and
by virtue of this certificate is sent back to H. the third parish to
which by this construction he must be sent, will lose an advantage
that the law gives it. Besides, what shall hinder the third parish
from sending him back to C. and so by consequence the end of
the act, which was most certainly the indemnification of C. will be
frustrated.

There is no doubt but it is in the power of churchwardens to
damage the parish, and that in matter of property too, as by taxing
an indigent person, and so consequently making a settlement. Ac-
cording to this construction the inconvenience is little or none, for
it is but to take care to certify the truth. But according to the
other construction all will be set afloat again, and poor persons
harrassed and oppressed by being sent for ever from parish to parish.

And

Trinity Term 9 Ann.

And the court were clearly of this opinion, but took time to consider of the *Northampton* president; but afterwards (*ut audiui*) held the certificate an estoppel upon *H.* against the whole world. *Vide* this case 2 *Salk.* 535.

* P. 12.

* Michaelmas Term

9 Annæ. B. R.

Buckley and Pirk.

Salk. 317.
Debt for rent
pleading.

IF an executor takes possession of the term of the testator, and an action is brought against him in the *debet* and *detinet* for rent or non-repairs, it is absurd for him to plead no assets *ultra* what will satisfy such and such judgments, because in such a case, the surplus of the profits, rent and repairs deducted, is all that is assets, and liable to the judgments; and therefore the rest of the profits are so appropriated to the payment of rent and repairs, as not to be exhausted by debts. *Vide* 1 *Salk.* 316.

Banister and Hopton.

Spiritual court
jurisdiction.

IN a motion for a prohibition in this case, it was agreed, that though a prescription, as whether a whole parish or a select vestry should chuse churchwardens, be a matter triable at common law by a jury, yet sentence is to be given in the spiritual court according to their verdict; and therefore though this be a matter triable at common law, yet if the party submit to a trial in the spiritual court, by not demanding a prohibition, it will be too late after sentence to move for one.

2 *Salk.* 548.

* P. 13.

* *Forte and Buviere.*

Church rates.
Parishioners
taxable for
building a
gallery.

THE major part of the parish, assembled in vestry, taxed the parish for building of a gallery, each parishioner ten times the value of an ancient rate. One parishioner refused payment, and was sued in the spiritual court, whereupon he prayed a prohibition.

Michaelmas Term 9 Ann.

1st, Because a parish could not be taxed for building a gallery, which was neither useful nor ornamental to a church; but this not much regarded by the court.

2^{dly}, The oldness of the rate. But the cases produced to maintain the prohibition on this head, did not come up to it; they being granted in cases where the rate was to continue always the same: but here there was a new rate modeled by the old; and if ten times the value of the old rate had been put into one intire sum, it would have been plain; besides, no need for the parish to depart from an old rate, until it grows unequal.

Parish of St. Mary of Reading *versus* St. Lawrence of Reading, about settlement of Joseph Marlow.

ONE *Joseph Marlow* was first an inhabitant of St. *Mary* in Stra. 411. *Reading*, afterwards he came into the parish of St. *Lawrence* of *Reading*, and during his stay there, was chosen warden for the borough, and exercised that office as well in that parish as in some others; after which he removed to St. *Mary's*, and there became chargeable.

The question was, whether his residing in the parish of St. *Lawrence*, and exercising the office of warden in that parish, (tho' he did it in others too,) was a settlement, by the 3^d and 4th of King *William*, or no?

a settlement within 3 & 4 W. & M. though he be not chosen by the parish, and exercises his office through the whole borough.

* It was insisted by the counsel for St. *Lawrence's*, that to make a * P. 14. settlement pursuant to that act, two things were requisite; 1st, The office must be a publick and annual office for the parish; but this was not an office for the parish but borough, neither was he chosen by the parish.

2^{dly}, It must be executed in the parish; but this office though it was executed in the parish of St. *Lawrence*, was so in other parishes too; and upon this ground it was very lately adjudged, that the payment of a scavenger's rate, being a ward rate, was no settlement within the act.

Judge *Powell* of opinion, that this was a settlement within the act, and that a man exercising an office in a parish, though in another too, and though not chosen by the parish only, might yet be esteemed properly enough a parochial officer.

Parker Chief Justice: The words of the act are as general with respect to the payment of taxes, as to the exercise of offices; and
VOL. X. D therefore

Michaelmas Term 9 Ann.

therefore since the payment of a scavenger's rate did not, in the opinion of the court, because a ward rate, amount to a settlement, by a parity of reason, neither will the exercise of such an office.

Powis of opinion, That he was a parochial officer, and more, therefore a settlement.

Eyre: Stat. 1 Jac. 2. cap. 17. made notice in writing left with the overseer of the parish necessary to a settlement. Payment of taxes and exercising of offices upon the equity of that act, judged equivalent to a notice in writing, and this act of the 3d and 4th of King *William* seemed to him made for the corroborating the equitable constructions upon that statute. He was of opinion it was a settlement, and that there was a vast * difference, in point of the notoriety, between payment of a scavenger's rate, and exercising the office of a scavenger; for the one might escape the notice of the parish, the other not.

* P. 15.

Parker Chief Justice: If the reason of the act be founded upon the notoriety of the fact, *Eyre* in the right; but he was of opinion, that the act went upon this reason, viz. that a person chosen to a parochial office, or assessed a parochial rate, was not a person likely to become chargeable; and this was the reason, why hiring for a year, and service accordingly, makes a settlement.

Next term, by consent of all, it was adjudged a settlement.

Cook and Parsons.

Eq. Abr. 280.
pl. 4.
2 Vern. 429.
Pre. Ch. 184.

Evidence.

AT a trial at *nisi prius* at B. R. in London, the case was this: It was said, at the conclusion of a will, signed, sealed and delivered by such a one, testator, and then subscribed by three witnesses. It appeared by depositions in a Chancery cause, whereof the bill and answer were lost, that they subscribed the will in the presence of the testator, but at three several times: the verdict was for the plaintiff; but a case of two points was agreed upon for further arguments: 1st, Whether the bill and answer being lost, the depositions could be admitted as evidence? 2^{dly}, Whether the signing of three witnesses, but at three several times, was a good execution of the will within the statute of *frauds and perjuries*?

As to the first point, *Parker* Chief Justice, who tried the cause, was of opinion that the depositions signed by the witnesses, though the bill and answer were lost, might be allowed as evidence to supply any point where the will was silent, but not to contradict the will.

* Hilary

* Hilary Term

* P. 16.

9 Annæ. B. R.

Anonymus, or Goodwin *and* Godwin.

THE point in question was, Whether an action of debt Debt.
founded upon a judgment in *B. R.* might be brought, Whether debt
will lie upon
a judgment in
pending error in the Exchequer-chamber. B. R. pending
error in Ex-
chequer-
chamber.

It was argued in favour of the affirmative, that the judgment was not suspended by the writ of error; because if it was, a release of all demands would not be a release of a judgment pending a writ of error, which undoubtedly it is.

It was said likewise, that the record was not removed by writ of error, but that only a transcript was sent.

It was also said to be a received rule in the Common-Pleas, that an action of debt would lie upon a judgment in the Common Pleas, pending a writ of error in the King's Bench; and that by parity of reason it ought to do so upon a judgment in *B. R.* pending error in the Exchequer-chamber: and all this was fortified by several cases in point.

* The point in question was given up upon account of the number * P. 17.
of cases in point, that debt would lie pending error. But it was strongly insisted upon, and the statute of 27 *Eliz. cap. 8.* relied upon for that purpose; that the very record itself was, in point of law, removed by the writ of error; and that therefore the declaration was naught, being of a record in *B. R.* whereas it should have been upon a record in the Exchequer-chamber.

Court: These actions of debt pending writs of error never favoured by *Hales* nor *Holt*.

To be considered, whether, though in fact, a transcript was only sent, yet whether in point of law, the record itself was not removed, because without it the judgment itself could not be affirmed or reversed: and also whether they could suppose the record in two places at once, in the one place to support debt, in the other error.

The authorities only kept the court from rejecting these actions, and therefore, though they held the writ of error to be no plea in bar,

Hilary Term 9 Ann.

bar, yet they doubted whether they might not admit it as a plea in abatement.

3 Salk. 55.

In these kind of actions, to discourage them, bail never allowed.
Adjournatur.

* P. 18.

* Easter Term

10 Annæ. B. R.

Jeffry and Barrow.

Case upon
stat. 3 & 4 W.
& M.

THIS was an action of debt upon bond, brought against the heir, and upon *riens per descens* pleaded, the plaintiff replies that he had lands, &c. sufficient to discharge, &c. the jury find for the plaintiff, *viz.* that sufficient lands to discharge, &c. did descend.

Moved in arrest of judgment, that this pleading being grounded upon 3 & 4 W. & M. that act ought to have been exactly pursued; and then the issue should have been only, whether any lands descended, and not the value of the lands; and if the jury found for the plaintiff, then the jury were to inquire of the value.

Parker Chief Justice, seemed to incline to the defendant merely upon this point, that it did not appear by this verdict, whether, when the jury found the descent of sufficient lands, they meant sufficient in respect to the debt in equity, or at common law, *viz.* the penalty; probably the jury intended, the equitable debt only; whereas judgment must be given upon the penalty.

* P. 19.

* Plaintiff put himself to great hazard, in this way of pleading, for though it had been found that lands were descended, yet if these lands were found insufficient, judgment must have been given for the defendant.

Powell doubted, whether this not being an immaterial issue, but a material one and more, it was not helped by 32 H. 8.

He doubted likewise, whether if it were not, yet this being an issue appointed by this act and more, it might not be supplied by another inquisition by another jury.

Easter Term 10 Ann.

Powis and *Eyre* of another opinion as to this point, for the stat. says *the jury*, viz. the jury that tried the cause.

As to the principal matter *Powis* concurred with *Parker*, Chief Justice.

Eyre of opinion, that this verdict was equivalent to an inquisition.

The end of the act of parliament was by the court thought to be, helping the creditor in case of alienation, and also the heir, that he might not run such a risque in pleading *riens per descent*, as to subject himself to the payment of the whole, if so be that but a penny was found to be descended.

Gibson and Albert. In Chancery.

O *Biter*, If a man unnecessarily makes any one a defendant, he thereby cuts himself off from the benefit of his evidence, for it is his own fault. Evidence. Chancery.

But where several are made defendants, it will not hinder any one of the *defendants* from the benefit of the evidence of any others that are made so.

* Indeed in case of trustees, it is necessary that they be made defendants, and therefore there the *plaintiff* may have the benefit of their evidence. * P. 20.

Brown and Litton. In Chancery. *J. C. 1. P. W. 149.*

MASTER of a ship went a trading voyage beyond sea; the succeeding master opens the effects of the deceased, in the presence of the crew; and then sends a letter with a bond inclosed, to the widow of the deceased, whereby he binds himself to answer to her *the sum of 300 l. if the ship arrives safe*; the sum the deceased left being 200 l. which was the rate of *respondentia* bonds there. The master trades and makes 300 l. *per cent.* of the money. Trust. Trade. Master of a ship goes a trading voyage, dies, successor opens publicly the effects of the deceased, and

then sends a letter inclosed with a bond to the widow, to be answerable for interest at the rate of *respondentia* bonds. Decreed per Harcourt Lord Keeper, that the successor was a trustee, and should be answerable for what he actually made of the money.

The question was, whether he should be bound to any more than this bond, or answer to the widow the profits of the money made in the way of trade.

The counsel for the master would have resembled it to the case of an executor or trustee, who shall be accountable for the interest only, and formerly for the money only.

Easter Term 10 Ann.

It was said also, that if this money had been lost in the way of trade, the master would have been accountable.

The counsel on the other side, and Lord Keeper too, thought it differed from the case of an executor; because the ship was to go a trading voyage, and the money was designed to be laid out in trade, and the succeeding master is in effect but a trustee for the representative of the former.

And they held, that if he traded with the money as with his own, with care and prudence, and then through any accident the money was lost, he would not be accountable.

* P. 21. * It was therefore decreed that he should account to the widow for the profit made by the trade, deducting reasonable allowance for labour and skill.

The *Lord Keeper* thought this resolution necessary for the encouragement of trade; it being a comfort to a man to know, that if he should die, the improvement of his effects in the way of trade by the succeeding master, should be for the advantage of his family.

If a trustee impowered to put money to interest, let the money lie by him, he shall be accountable for interest.

Lord Keeper seemed of opinion, that if a trustee should trade with the money, he should be accountable, not for interest only, but the profit of the trade; and that at his own peril, because he acted of his own head, without applying to the court of Chancery for direction in disposing of the money.

Sadler and Daniel. B. R.

Prohibition.

THE question was, whether a man might be sued in the spiritual court, for taking away the goods of an intestate from the administrator; or whether a prohibition should not go?

Resolved there should be a prohibition: for when an administrator is made, the power of the ordinary is determined; and there being a compleat remedy, at the common law, for the administrator, in an action of trover, the party would by this means be doubly harrassed; for an excommunication could never be pleaded in bar of an action of trover.

It is difficult to say when this power was first vested in the ordinary, but probably superstition was the cause. However, now by the statute law, the ordinary must grant administration, and then his power is determined; and the administrator, when put in by

* P. 22. * the ordinary, derives his power not from the ordinary, but the law.

Bishop

Easter Term 10 Ann.

Bishop and Eagle. B. R.

THIS was an action of account brought by the present church-wardens against the former ones. They plead that the plaintiffs are no church-wardens. Issue joined, verdict for the plaintiffs, and judgment, *quod computent*. 11 Mod. Rep. Q. Ann. 186, 263. Account against church-wardens.

Before the auditors they plead, that they received such a sum of money as churchwardens through a mistake, when none was due to the parish; that perceiving the mistake, they repaid the money; to this plea the plaintiffs demur.

Pro quer. It was said, that no plea that had been a good bar of the action, could be pleaded before auditors. It is true they could not have pleaded *ne unques receiver*; for they did receive, and for the use of the parish; but they might have pleaded it specially, and so shewn that they were not accountable at the time of the bringing the action.

It was allowed by the defendants counsel, that no plea, which would have been a good one to the action, could be pleaded before auditors. But here as *ne unques receiver* could be no plea, since they did receive and for the use of the parish; so that had they been robbed, or not repaid the money, they must have remained accountable; certainly a fair defence, and admitted for true by the demurrer.

Judge *Powell* of opinion *pro quer'*, for they might have pleaded this matter specially, though they could not plead *ne unques receiver* generally.

Parker Chief Justice, of opinion with the defendants. Admitting this to be a good plea before auditors, it will be necessary for the churchwardens to plead such a * plea, as shews them to be * P. 23. honest men, *viz.* not only that it was paid them by mistake, but repaid. Whereas taking it the other way, and to be a good plea in bar, receipt by mistake will be no receipt at all, and it will not be necessary to shew repayment, but only that the money did not belong to the parish; this therefore inclined him to support the plea as far as possible. Besides, had they paid this money to the parish, before the knowledge of this mistake, the parish would have been charged with this money; repayment was therefore an act done in discharge of the parish, and therefore a proper plea before auditors.

Whether or not the churchwardens, after payment of the money to the parish, *viz.* the use for which they received it, and this before knowledge of the mistake, could have been charged in an *indebitatus assumpsit* for the money? *Powell* and *Parker* differed; the former thought they might, the latter that they could not.

There

Easter Term 10 Ann.

There was another point in this case, *viz.* whether the church-wardens should be allowed their expences, and surplufage, in case their expences out-ballanced, &c.

Churchwar-
dens more
than recei-
vers.

Court clear that they should; for church-wardens are more than bare receivers; they are in all all respects bailiffs.

Bailiffs.

The rule generally taken, that a bailiff shall be allowed expences and surplufage in an action of account, but not a receiver, holds true only of a bare receiver; and as to him the reason is evident. But where the nature of the thing shews, that the receiver must be put to trouble and expence, the rule is false.

* P. 24.

* Trinity Term

10 Annæ. B. R.

Whetherborn *and* Wright.

Special bail.

WHERE a debt is ten pounds or upwards, by course of the court special bail is required, otherwise not. Not common, where an action of debt is brought upon a bond of 20 *l.* conditioned for the payment of nine pounds, to hold to bail; for though the penalty which is the legal debt exceeds ten pounds, yet the real and equitable debt is less. But upon some particular cases, as where it is to be feared a person will run away, &c. the court will hold to bail, for the legal debt exceeds ten pounds.

Templeman *and* Case. B. R.

Action upon
case.

Fleeding.

ACTION upon the case for entering the house and taking the goods of the plaintiff in the said house. Defendant pleads in bar, that he entred in aid of a bailiff who had a writ of execution, and took the goods of another, and not of the plaintiff. Plaintiff demurs.

1

* Upon

Trinity Term 10 Ann.

* Upon the demurrer three points arose; 1st, That this plea * P. 25.
amounted to no more than the general issue. 2^{dly}, That this plea
was naught for want of shewing how the goods came there; whe-
ther wrongfully, or rightfully. 3^{dly}, Naught, because said in as-
sistance, and not by command of the bailiff.

Court: Bar good; notwithstanding these exceptions. For as to
the 1st, a possessory right is sufficient to maintain an action of tref-
pafs or case, though not a replevin; and upon Not guilty pleaded,
this given in evidence, that they took another man's goods, and not
the goods of the plaintiff, would not have maintained such a
general plea; because though the goods should not in reality be the
plaintiff's, yet being in his house and possession, they are so far his,
as to maintain this action.

As to the 2^d, impossible for the defendant to shew how.

As to the 3^d, command or desire of the bailiff not necessary;
for every one not only may, but is by law bound to give their as-
sistance to officers in execution of justice.

Petworth Parish. B. R.

MOVED to quash an order of justices, three exceptions taken: Order about
settlement af-
firmed upon
appeal to ses-
sions, final.
1st, That there was a former order from the parish of *A.*
to that of *Petworth*, and this order being affirmed upon an appeal to
the sessions, it was final not only between the parishes that were
parties, but all others, except a subsequent settlement could be
found out; that therefore this order, which was to remove one
William Pack and *Katharine* his wife, together with their children,
from *Petworth* to *Ringmore*, should be quashed.

* 2^d Exception, That the ages of the children not appearing, they * P. 26.
may have gained a subsequent settlement. Mod. Cases
in Law and
Equity 337.

3^d Exception, No adjudication to become chargeable, but likely
to become chargeable.

Court: 1st and 2^d exceptions good; the 1st a point lately settled.
As to the last, order is good notwithstanding.

Player and Bandy. B. R.

RESOLVED that in an action of debt upon a bond, though Costs.
Statute for
amendment of
the law.
the money be tendred before action brought, which is refused,
that yet the plaintiff must have costs. For the statute for the
amendment of the law gives the court no jurisdiction until after ac-
tion brought, and therefore they cannot take notice of a tender
before:

Trinity Term 10 Ann.

before: besides, said by *Powell*, and contradicted by none, that that statute had enabled the defendant to plead payment, or to bring the money into court; but not to plead tender, refusal, and *uncore priss*.

Queen. and Mathews. B. R.

Conviction
upon game
act.

THIS was a conviction upon 4 and 5 of *Queen Anne*, for the preservation of the game.

Objections.

Two exceptions taken; 1st, That the charge setting forth that the defendant *Mathews* not being a person so and so qualified, and enumerating distinctly the several qualifications in the act of *Car. II.* for the preservation of the game, omitted a new qualification allowed by this act, viz. That he was not a person authorized by a lord or lady of a manor to kill game for their use.

* P. 27. 2^{dly}, That the person was here charged with so many five pounds as he killed hares in the same day; * whereas the offence in the statute was the keeping of dogs, engines, &c. not killing hares.

Court of opinion, That had it been laid generally thus, that he not being a person qualified according to law, it had been enough; but the qualifications being distinctly and severally mentioned, omission of one fatal.

As to the 2^d point, the court was of opinion, that the offence for which the statute gave the forfeiture, was the keeping of dogs and engines, not killing the hares. If a man not qualified go a hunting, and kill never so many hares upon the same day, he would forfeit but one 5 *l.* for it is but one offence. But if a man keeps dogs, and goes a hunting several days, and kills hares; if it had been thus laid, that he such a day kept dogs and killed, &c. and then again such a day; by laying it thus severally, the offence is severed, and he shall forfeit five pounds for each offence. *Adjournatur.*

Michil

Trinity Term 10 Ann.

Michill and Reynolds. B. R.

Vide post. Term. Pasch. and Term. Hill. 11 Ann.

AN action of debt was brought upon a bond; the condition whereof was, that whereas *A.* had taken the shop of *B.* who was a baker, for the term of so many years, and had given *B.* so much money for it. The condition of this obligation was such, that if during those years *B.* should not exercise the trade of a baker within the parish where the shop was, that then the bond should be void, otherwise, &c.

Whether this bond was good, or not, was the question.

It was argued that the bond was good.

In 3 *Levinz* 241. there was, it must be confessed, a difference taken between a bond and a promise; and it * is said that a bond in this case would be void, but a promise good; and in other cases quoted in that case, as in *Cro. Jac.* 597. this difference is warranted. The reasons assigned for this difference are two; 1st, Because in a bond the jury cannot mitigate the damages, but must give the whole penalty, be the damage to the other by setting up the trade ever so small. 2^d Reason is, that the publick interest is concerned, to promote and encourage trade; and therefore such a condition is against the publick interest, against *Magna carta*, and *malum in se*, and therefore the bond void.

As to the 1st of these reasons, it holds against all bonds in general as well as this. Besides the difference is not true; for even in a promise, if it be certain, it was said, that the jury have no discretionary power in giving damages.

As to the 2^d it was answered, that how prejudicial soever, to the publick, a general and absolute restraint of a man from his trade may be, certainly a particular restraint, limited to one place only, as the present case is, can be none at all; for how is the publick concerned whether a man exercises his trade in *Holborn* or in the *Strand*? There is a great difference between the opinion of the court upon matters before them, and what is said *obiter*, and collateral to the case in question; and this case has never been judicially determined: but if such opinions are of weight, in the case of *Tbompson* and *Harvey*, Sir *Bar. Shower's Rep. fol. 2.* there is a difference taken between a bond, where the condition is a general restraint, and where a particular one. The bond there is adjudged to be void, because it is a general restraint from the exercise of a man's trade; but there it was admitted to be good, had it been, as here it is, only a restraint in a particular place.

P. Will. 181.

Fort. 296.

Trade.

A bond conditioned for restraining a man from the exercise of his trade for a certain time, and in a certain place, when entered into upon a fair and reasonable consideration, good.

* P. 28.

Trinity Term 10 Ann.

* P. 29. As to the reason of the thing in general, there may certainly be a very good reason for the making of such bonds. Suppose a gentleman has a noisy, stinking trade near him, he may be willing to give him a * valuable consideration for removing further off. Suppose a man gives his apprentice such a sum of money, provided he will enter into a bond of such a penalty, not to set up within such a distance. If this bond be adjudged void, what is the consequence, but a mere circuit of action? viz. the forcing of him to bring an action upon the promise, and give this bond in evidence.

Argument
pro defendant. To prove the bond void, the difference taken in the books between bond and promise, was strongly insisted upon; and the case in 3 *Levinz*, where the aforesaid difference is taken, was backed by other authorities, viz. *Moore* 115, 242. 3 *Leonard* 217. *Marsh* 191. One reason more was offered, not taken notice of in the books, that the allowing of such bonds might be a means of introducing monopolies.

Judge *Powell*: Where an action is brought upon an *assumpsit*, though the promise be never so certain, the jury may mitigate the damages, and give what sum they please. Many are the authorities that maintain the difference between bond and promise; no bond ever yet adjudged good that restrained a man from the exercise of his trade: of opinion bond was void.

Parker Chief Justice: I never yet knew such a bond adjudged void. The case in *Cro. Jac.* 596. is the leading case, as to the difference between bond and promise, and the difference itself supposes the condition lawful, and most certainly there may be many good reasons for entering into such a bond.

* P. 30. I know of no case, besides that of an infant, (and that stands upon another consideration,) where a promise shall be good, and a bond entered into for the performance of that promise void. Something extraordinary, that a court of justice should endeavour to render the breach of a just and fair promise as easy as possible; for that would be all the consequence of our * judgment, should we adjudge the bond void; for if the plaintiff should fail in this action, he may yet have recourse to an action upon the promise, and give the bond in evidence of it. And as for the reason given for the difference between bond and promise, there is this to be said against it, that as a jury may give less than the penalty, so they may give more. Now suppose it were my intention to bind myself in such a penalty, not a very great one, not to use my trade nigh such a person; with design, that if I should afterwards think that the use of my trade, would be of more advantage to me than the penalty, it should be at my election: is it reasonable, that a jury, contrary to my declared intention in writing, should have it in their power to give
twice

Trinity Term 10 Ann.

twice the penalty, if they think fit, or the other party is so much damnified by my breach of promise?

Judge Eyre of the same opinion with Parker.

Adjournatur. Vide post. Term. Pasch. 11 Ann. and again Term. Hill. 11 Ann.

* Lure and Rest. B. R.

* Lever.

AFTER a writ of inquiry executed, and before entry of the judgment, which was delayed by act of court, the plaintiff dies. Moved that, this happening by the delay of the court, judgment might be entered as of two or three terms ago. In behalf of the motion was cited the case of *Ventris, Philip and Jackson*, where said, that if the court delay entry of the judgment, there judgment may be entered as of two or three terms ago, without entering of continuances.

Delay of the court ought not to prejudice suitors.

* Thomlinson and Dighton. B. R.

* P. 31.

THIS was a writ of error upon a judgment in the court of Common Pleas in an ejectment. The case was this:

Vide post.
Mich 10 Ann.
Salk. 239.
240. S. C.
P. Will. 149.
Com. 194.

A tenant in fee of the lands in question devised the lands to his wife for life, then to dispose of according to her pleasure, provided it were to some one of the testator's children. The husband the devisor dies, and leaves behind him a son and a daughter, the wife marries again; then the wife, by lease, release and fine levied covenants to stand seised, to the use of herself for life, without impeachment of waste, remainder to her daughter by her first husband in tail.

Tenant in fee of lands in question, devised the land to wife for life, then to dispose of according to her pleasure, provided it was to some

one of the testator's children. Devisor dies, leaves behind him a son and daughter, the wife marries again; then the wife by lease and release, and fine levied, covenants to stand seised to the use of herself for life, without impeachment of waste; remainder to her daughter by her first husband in tail. Resolved ist, that the wife took by this will an estate for life; and 2dly, that the power in this case was well executed.

The question was, whether this conveyance of the lands were a good execution of the power, so that they should go to the daughter; or else, being bad, to the heir at law, viz. the son.

The court of Common Pleas gave judgment for the daughter. And now a writ of error being brought into B. R. it was argued by Mr. Lutwyche for the plaintiffs in error, and by Peer Williams for the defendant.

Trinity Term 10 Ann.

Argument *pro quer.* in error.

The points considerable in this case are two, 1st, What estate the wife takes by the devise, whether an estate for life or in fee. 2^{dly}, Whether the power be well executed.

* P. 32.
Estate for
life.

* As to the 1st clear, that she has but an estate for life; for it is expressly devised to her for life. And though the words following be to dispose of according to her will and pleasure, provided it be to any of her children by the testator, these words give her but a naked power and authority and no interest; as was resolved in the case of *Daniel and Uply*, where the devise was to the wife to dispose to which of the children she pleased. But the principal case is here much stronger, for it is in express words devised to the wife for life, & *quoties in verbis nulla ambiguitas*, &c. 3 *Leon.* fol. 71.

2d point.

As for the 2^d question, whether the power was well executed; it is true that there are cases, where the conveyance shall take effect by way of covenant to stand seised, when it can no other way else whatever. So is *Crossing and Scudamore's* case, and other cases then cited, as reported by *Ventris*; but there in 2 *Ventris* 318. 1 *Sid.* 25. 1 *Rolls* 329. it is said, that where there is a transmutation of the possession, there the estate shall never pass by way of covenant to stand seised.

This is a very improper sort of conveyance, for here the estate is conveyed by lease, release and fine, acts not proper for tenant for life.

It is a rule that a power and authority ought to be strictly pursued, and in *Co. Litt.* there is this difference taken, that if a person authorized does less than his authority warrants him, it is void; but if he exceeds it, it shall be good for as much as falls within the power, and the rest shall be but surplusage: now here the power is to give in fee, but is executed only in tail. By the method of the conveyance, very plain that the intention of the wife was to pass the estate as owner, and not by virtue of the power; and the rather because the wife is here possessed of an estate, viz. an estate for life: besides, the estate passes by the fine.

* P. 33.
Argument for
the defendant.

* *Peere Williams* argued for the defendant, that by this devise the wife took an estate in fee. Had the devise been only thus, *to the wife to dispose of at pleasure*, it had been very plain that she had had a fee-simple, according to 1 *Inst.* 113. a. *Dallington* 38. then the words after added, *provided she dispose of it to some of the testator's children*, make it a conditional fee-simple; so resolved in *Daniel and Uply's* case, 1 *Jones* 137. but being put in mind that in this case it was expressly devised for life, he gave up this point.

But then admitting the wife to have but an estate for life, he argued, 1st, that the woman's marriage was no suspension of the power; 2^{dly}, that the power was sufficiently though improperly executed.

Trinity Term 10 Ann.

1st, That the second marriage was no suspension of the power, he proved from the case of *Daniel and Upton*, 1 Roll. 329. where the case is, A man devises that his wife shall sell his land, husband dies, the wife marries; resolved that the wife might not only sell the land, but even sell it to her second husband, which is a much stronger case than the present.

2^{dly}, That this was a good tho' improper execution of the power.

Judges are said to be *astuti* to do right; and therefore this power, instead of a strict interpretation, ought to have a large and extensive one; so that any writing whatever, that was but enough to signify the intention of the parties, where the power is so general, and no particular way of execution is prescribed, would have been enough; and if so, then certainly the power is well executed. For a deed of lease and release was a sufficient declaration of her mind; and as for her estate being limited without impeachment of waste, that shall be rejected as surplusage, which even in pleading *non nocet*.

As for the objection, that the method of this conveyance seemed as if she designed it as owner of the land; and the rather here, because she was seised of an * estate for life: he answered, that there * P. 34. is a difference between a person's having such an estate as will enable him to make such a conveyance, for there it shall operate by way of gift as from an owner; and where a man has not such an estate as will enable him to make such a conveyance, for there the deed shall operate by way of execution of the power, and so is Sir *Edward Clee*'s case; and though there be no recital of the power, yet if the grant cannot work without the power, it shall with it. But here the deed of lease and release recites the power, which carries in it the highest presumption of the intention of the parties that it should so operate; which makes it a much stronger case.

And then if it operates as an appointment, the estate shall not pass from the trustee, but the appointee shall be in from the will. The *grand* intention of the parties is the passing of the estate, and not the *how* or *manner* in which this is done, whether by virtue of the power, or deed of lease and release, &c. And the court will be more solicitous to uphold the primary intention of the parties, than that which is only a secondary one; without doubt they will never adhere to the latter, to the destruction of the former; and therefore, though the intention of the parties were to pass the land by lease, release and fine, yet when it cannot pass so, it shall as an execution of the power; *quum quod ago, non valet ut ago, valeat quantum valere potest*. 3 Levinz. 372. 1 Jones 392. Stapleton's case. 1 Ventris, King and Melling. Gier and Offiter 1706.

The last of these cases full in point; and though it be but the opinion of a single judge at an assize, yet it being the opinion of so great a man as the late Lord Chief Justice *Holt*, it may be of some weight. That case was shortly thus: A man by will was made tenant for life, with a power to jointure or settle upon his wife; and though

Trinity Term 10 Ann.

* P. 35.

though the conveyance was *there as here*, by lease and release, yet that judge was of opinion, that it was a good execution of the power. Now in that case, * the same objections might have been made as here; and with equal force: for if it be said here, that the estate passes by virtue of the fine, it may be answered, that if a lease and release shall operate as an execution of the power, and signify no more than the declaration of the intention of the parties, then will the appointee be in by virtue of the power in the will, precedent to the fine, and the fine being subsequent will signify nothing. In *Ventris* 368. *Herring and Brown*, it was resolved, that where the fine is precedent to the deed, that there it is an extinguishment of the power; but if it had been subsequent, as here it is, the power would have been well executed, notwithstanding the fine; and in the Exchequer-chamber, resolved to be good even though the fine were precedent. 2 *Levinz* 14.

As for the objection, that the power is to dispose in fee, and executed only in tail, nothing in it; more implies less. A power to pass an estate in fee, is most certainly sufficient for passing an estate in tail.

Judge Powell: The main question of the case is, Whether the power be well executed? A feoffment to a man's own son shall operate as a covenant to stand seised; rather than the intention of the parties should be frustrated. *Sir Edward Cleer's* case is express, that where it can pass no other way than by virtue of the power, it shall pass that way, though the intention of the parties were, that it should pass another. And as for her own estate being limited without impeachment of waste, as to the impeachment of waste it shall be void, because it exceeds the power: the intention of the parties plain.

Of opinion *pro* defendant.

* P. 36.

Parker Chief Justice: In *Sir Edward Cleer's* case it was resolved, that where, according to the way the parties intended, the conveyance would have no effect at all, that there it should pass another way: but where, * should the estate pass the way the parties intended, the conveyance would have some effect, though not all that was intended by the parties, there it should pass no other way than the parties designed. But this point since has been carried much farther, as that, where it would have some effect, but not all intended by the parties; that there, to the end the main design of the parties may be observed, the estate shall pass in another way than the parties intended. For example, suppose a woman seised of an estate for life, with a power to make a lease for three lives, or 21 years, she marries, and then she and her husband join in making the lease, and husband and wife both die before the lease is expired; here though the husband in right of his wife, and she in her own, are possessed

Trinity Term 10 Ann.

possessed of an estate for life, and therefore can as owners make a lease, and there appears no intention of the parties (imagining perhaps that they should have outlived the lease) that this lease should be made by virtue of the power; yet because the lease, supposing it made by them as owners, cannot have all the effect the parties intended, for some it would have, (it would be a good lease during the lives of the husband and wife) yet because it cannot have all, it shall be esteemed made by virtue of the power. But in the present case the conveyance, as intended by the parties, would be wholly void.

Of opinion *pro* defendant, and that the judgment in *C. B.* must be affirmed.

* *Louviere and Laubray.* B. R.

* Lany.

AT *Nisi prius* in the court of Queen's Bench, London, the case happened to be this: *Louviere* used to furnish *Laubray* with great quantities of stockings: *Louviere* draws a bill upon *Laubray*, payable to such a one; *Laubray* accepts the bill, but some time after protests it. Upon this the bill is indorsed to *Louviere* the drawer, who brings an action as indorsee.

* The question was, Whether the drawer of a bill could maintain an action as indorsee? * P. 37.

Parker Chief Justice of opinion, that upon evidence given to the court, that there were effects of *Louviere* in the hands of *Laubray*, enough to answer the bill; and that consequently the acceptance of the bill was not upon the honour of the drawer, the action was well brought. For when a merchant draws a bill upon his correspondent, who accept it, this is payment; for it makes him debtor to another person, who may bring his action. This therefore is such a payment as may be set off upon a former account, and pleaded in bar of such an action: but if there were no effects, then the action would not lie; for it would have been an acceptance upon honour only, and the money would be recovered only to be recovered again.

N. B. Interest ruled to be paid from the time of the protest.

* *Osway and Bristow.* B. R.

* Otway.

AN action of trespass for taking cows in the plaintiff's close. Defendant pleads in bar, that they were damage feasant *in clausu suo*. Plaintiff demurs, because he set forth no title to the close.

Trinity Term 10 Ann.

Resolved that it was well without it; for a possessory right is sufficient to maintain an action of trespass. And this difference was taken, that where the defendant justifies to a place specially laid down in the declaration, there a title must be shewn; but where no place is specially laid down, as here there is none, there he need not.

* P. 38.

* Michaelmas Term

10 Annæ. B. R.

Rumball and Ball.

Debt upon
note.

ACTION of debt upon a note to this effect; I acknowledge myself indebted to such a one so much, which I promise to pay upon demand. Moved in arrest of judgment, that though upon a note acknowledging a debt it was not necessary to alledge a demand; yet where it is part of the agreement, there a demand is necessary.

But the court were of another opinion, for it is a debt *in presenti*; and the words *promise to pay*, import no more, than that I am ready to pay the money at any time, and shall not restrain or qualify the other words, this being no debt arising upon the performance of a certain condition, but a debt plainly precedent to the demand. Besides, supposing the demand necessary, action itself perhaps is a demand.

* P. 39.

* Shorer and Shorer. In Chancery.

See Gillb. Rep.
Equity 91.

Lingen and

Sourcy.

Marriage a-

greement that

1400 l. should

be laid out in land, this not done, question, whether since it ought to have been done; it should not in a

court of Equity be considered as done, so as to pass by will under the word land. Held per Lord Keeper

Harcourt that it should.

A Man marries a wife worth 700 l. and binds himself by marriage articles to invest 1400 l. in land to such and such uses, viz. to himself for life, remainder to the heirs of their bodies begotten, the remainder to his right heirs. The husband dies, the marriage articles unperformed, and by his will devises a house value

1400 l. should be laid out in land, this not done, question, whether since it ought to have been done; it should not in a court of Equity be considered as done, so as to pass by will under the word land. Held per Lord Keeper Harcourt that it should.

+ seems to
be p. l.

Michaelmas Term 10 Ann.

15 *per annum* to the wife, and 90 *l.* a year to his nephews, having no children; then comes the clause in his will, *and all my other lands in York, or any other part of Great Britain, I leave to my nephews.*

The question was, Whether the 1400 *l.* though not actually invested in land, should notwithstanding in equity be deemed land, so as to pass by the word *land* in the will, saving to the wife her interest for life; or, Whether it should go with the personal estate?

The wife being executor contended, that it should be looked upon as personal estate, because then she should come in for a share in the surplus, unexhausted by debts or legacies.

The court did nothing in the affair, but ordered a reference to the master to state the matters of fact.

But Lord Keeper *Harcourt* declared it to be his present opinion, that where there is such a marriage-agreement for so much money to be laid out in land, that the money, in case the husband died the agreement unperformed, should in equity be esteemed land, and may be devised as such, subject in the first place, to the uses declared in the marriage-settlement.

* Harvey and Wright. B. R.

* P. 40.

THERE was this question raised concerning understanding a rule of court: The rule was, if a cause was not at all prosecuted in four terms, neither party could revive process, without giving the other a term's notice: Now whether notice at any time within the term, as *e. g.* the last day of the term, would satisfy the rule; or whether the rule does not require a whole term's notice?

The court, upon time taken to consult the rest of the judges, that all the courts might be uniform in their practice, delivered their opinion, that by a term's notice was meant, that a whole term should intervene between notice and trial, that so either of the parties may have time and opportunity to apply to this court. In the courts of *C. B.* and *Exchequer*, where they had the same rule in so many words, it was so understood.

Lord Say and Seal's Case. B. R.

UPON a trial at bar in *B. R.* in an ejectment brought by the heirs at law, against the Lord *Say and Seal*, who claimed as heir in tail, the single question was, Whether or no a common recovery, that was suffered in order to dock the intail, was good or not?

The

Michaelmas Term 10 Ann.

The objection to the recovery was, that there was no tenant to the *præcipe*.

To prove the recovery good, a deed bearing date 23 Oct. 1701. directing the uses of the recovery, and the fine, viz. the chirograph of the fine, and common recovery were produced.

Evidence.

* P. 41.

The counsel for the Lord Say and Seal, desired to call one *Knight* an attorney at law, to prove, that though * the deed was dated Oct. 23. it was not executed until five months after, viz. in March. N. B. The attorney was the person intrusted in suffering the common recovery.

Attorney's
privilege.

The counsel for the heirs at law, opposed the swearing the attorney: Because as an attorney has a privilege, not to be examined as to the secrets of his client's cause, so the attorney's privilege was likewise the client's privilege; for the client intrusts an attorney with the secrets of his cause, upon confidence not only that he will not, but also that though he would, yet he should not be admitted by the law to betray his client, and for this *Holbeche's* case was relied upon. Besides, it was said that his evidence would tend to accuse himself, either of ignorance, negligence, or something worse; and in *Moore's Reports*, antedating deeds felony.

The court were of opinion, that *Holbeche's* case was good law; and that an attorney's privilege, was the privilege of his client; and that an attorney, though he would, yet should not be allowed to discover the secrets of his client. But notwithstanding this, they thought *Knight's* evidence was to be received; for that a thing of such a nature as the time of executing a deed, could not be called the secret of his client, that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature that an attorney concerned, or any body else might inform the court of.

* P. 42.

Knight being called in, swore, that it being feared the common recovery would be good for nothing, because it was doubted whether there was a good tenant to the *præcipe*, at the time of the common recovery suffered; it was agreed upon as the best expedient, that there should be a fine as of *Sancti Michaelis* levied to make a tenant to the *præcipe*, which was five months before the * fine was actually levied; and that there should be a deed, which should declare the uses of the fine and recovery, and recite the fine to be of *Sancti Michaelis*; and that the deed was executed when the fine was taken, viz. in March.

Then

Michaelmas Term 10 Ann.

Then the chirograph of the fine was produced, according to which the fine was levied as of *Michaelmas* term; and if so, without controversy, there was a tenant to the *præcipe*, and so all was well.

The counsel for Lord *Say* confessed, that the chirograph of a fine was *prima facie* good evidence; that it was an evidence of so high a nature, as that no parol evidence should be allowed to falsify it: but they said it might by matter of record. To clear the way, they mentioned the clause in the stat. 5 *Hen.* 4. that orders the enrolment of fines, and that of 23 *Eliz.* cap. 3. which directs, that the date of the concord, should be certified by the judge, before whom the fine was levied.

Chirograph of
a fine.
Evidence.

Then they said that the concord of the fine was certified by Lord Chief Justice *Trevor*, to be taken upon the 2d of *March*; and this evidence being an evidence of record, they offered to falsify the chirograph.

But to this it was objected, that the chirograph of a fine was a record of so high a nature, that unless it be void, and not only voidable, it cannot be vacated by any evidence whatsoever, but writ of error only. And that it was not a nullity and void, they cited 2 *Ventris* 47. and *Hobart* 330; where *A.* and his wife acknowledged the note of a fine the 26th of *March*, before commissioners, by *dedimus potestatem*; the wife died the 27th of the same month, the 28th composition was made in the alienation office, upon a writ of covenant, returnable in *Hillary* term before, and the King's silver was entred as of the same *Hillary* term. * This fine upon debate * P. 43. resolved to be good. *Dyer* 202, *Carril's case*. *Dyer* 89. b. *Cro. Eliz.* 275; where it appeared by the record, that the caption of the conuzance of the fine was the 27th of *March*, and the writ of covenant and *dedimus potestatem*, were dated the 9th of *April*; and it was now, in a writ of error to reverse the fine, objected, that the conuzance was taken without any warrant, and that by 23 *Eliz.* the caption was always to be certified: but the court over-ruled this exception, and would not hear it argued; because, it would shake several fines, &c. And it is a common practice, that a fine levied in the vacation, may, at the choice of the parties, be a fine of either the precedent or subsequent terms, which differs from the case at bar only in this, that here there is an intervening term; and whether this will occasion such a difference, as that in the one case the fine should be good, in the other not only voidable but void and null, depends upon the practice of the court of Common Pleas, where this matter should properly have been canvassed. Though a fine presupposes a writ of covenant, yet the common practice is now to levy them without. *Clerk and Ward* was a case, and the only case where a fine was attempted to be destroyed by evidence, and this was

Michaelmas Term 10 Ann.

Maxim of
law.

in a court of equity, viz. the Chancery, and yet *there* it was not suffered; and this opinion was confirmed upon error in the house of Lords. As for the stat. of *Eliz.* it only extends to fines taken by *dedimus*, and only to regulate not annul fines, as the clause of *any attornment*, &c. *Sec. 5.* shews, for *exceptio probat regulam in rebus non exceptis*. *Statute de donis* says such fines shall be *ipso jure* null; yet this has been interpreted voidable only: and a discontinuance outlawry is said by an act of parliament to be *ipso facto* void, and yet it has been held voidable only by writ of error; and if this construction prevails in an outlawry penal in its nature, *a fortiori* it ought in things so much favoured as fines.

* P. 44.
Statute of
23 Eliz.

* Counsel for the Lord *Say* contended the fine to be void, by 23 *Eliz.* for if it be interpreted, to make fines voidable only, it will help none but those that are intitled to a writ of error, and not remainder men, who are not so; so that according to this construction, the act will relieve but half of those it was designed to relieve.

Peere Williams of counsel for the plaintiffs, the heirs at law, replied to this, that there might be found some cases in law, where the party grieved was without remedy; and instanced in the case of bail, who, though as much grieved by an erroneous judgment as the principal himself, can yet bring no writ of error to reverse it.

Court: Very harsh doctrine to be laid down in a court of justice, that there may be a wrong without a remedy! especially when the present case requires no such argument; for if the Lord *Say* should be wronged by our refusal of this evidence, he has yet a very proper and easy remedy, viz. to apply to the court of Common Pleas to vacate the fine, if in truth it be voidable.

It is agreed, by both sides, that it is common practice for a fine levied in vacation time, to be at the election of the parties, a fine either of the precedent or subsequent terms, which yet according to this doctrine must be a meer nullity. Whether the intervening of a term can make such a difference, as that in the one case the fine shall be good, in the other utterly void, cannot be discovered from the reason of the thing, but must depend intirely upon the practice of the court of Common Pleas; a plain argument that *that* is the proper court to relieve, every court being judge of its own rules. In the case of *Clerk* and *Ward*, such kind of evidence was refused even by a court of equity, viz. the Chancery; and this judgment was confirmed on a writ of error in the house of lords.

* P. 45.

* As for the acts of parliament mentioned, it seems unreasonable to put such a construction upon them, as that more exceptions should make fines null, since those statutes, which were designed to protect and support them, than before.

Michaelmas Term 10 Ann.

Besides, these statutes extend only to fines taken by *dedimus*; and though now most fines are in fact taken so, yet they are recorded as taken in court, and this to prevent questions about captions.

This case not to be distinguished, in the reason of the thing, from the case of a warrant of attorney to confess judgment, and before judgment confessed party dies, and judgment is confessed after his death, where the judgment can be avoided by error only. While a fine remains a record, intire credit must be given to it.

Besides, this evidence if allowed will not be conclusive; for it will not follow that if there be a caption returned such a day, there was no other taken before; for there may be twenty captions, there may perhaps be another fine really had.

If a caption and covenant were of the essence of a fine, they ought to be given in evidence to prove a fine, but this is never done.

Common recoveries, though no tenant to the *præcipe*, good by way of estoppel, against the party that suffered it, though not against remainder men strangers, &c.

After this, there was a deed of bargain and sale inrolled produced, which would have made a good tenant to the *præcipe*, had the opinion of the court been against the plaintiffs, as it was for them.

But to this deed this objection was made, that it was a tripartite deed, and ran to this effect: *This indenture made the day of between of the one part, and of the second part, and of the third part, witnesseth, that for and in consideration * of the sum of 5 s. to him in hand paid, hath given * P. 46. and granted, &c.*

Now here they said the person granting is wanting, *hath granted*, The grantor without saying *who hath granted*, and consequently this deed passes nothing, and can therefore make no tenant to the *præcipe*. omitted in a deed.

By way of inforcing this objection, it was said, that to make a good deed proper words are requisite, there must be a grantor and grantee, and it is not for a court of law to spell out the intention of the parties. If the failure had been of a grantee as it was of a grantor; for example thus, *In consideration of 5 s. paid by A. that therefore the Lord Say did grant*, without saying to whom, nothing most certainly would have passed, where yet the presumption would have been full as strong. *Hastlewood's case*, 2 *Ventris*, much relied upon.

If the construction of a deed is always to be governed by the intention of the parties, a grant of land to a man for ever, would convey a fee; and a grant to a man and his issue, an estate-tail, as well as in a will.

To

Michaelmas Term 10 Ann.

To this it was replied by the counsel for the plaintiff, that it was not a thing to be doubted, but there must be a grantor and grantee; but the question was, whether though this deed be not as exact in form as it might have been, yet a grantor may not with certainty enough be collected from the whole deed. As to the case 2 *Ventris* 196. *Ventris* was against the judgment; besides, that was a case upon pleading, where forms are more strictly required and adhered to than in deeds; and in 2 *Ventris* 141. there is a case clear contrary. In *Beniger* and *Forgassa's* case in *Plowden's Commentaries*, there is a collection of cases where names shall be supplied. And it is a maxim of law that a deed shall never be construed void, if it can by any means be made good; and what the intent of this deed was, and that * according to *that* the Lord Say was grantor, was proved beyond dispute from several parts of the deed. 3 *Levinz* 21. a man was bound in an obligation not said to whom, yet this was supplied by the intention. 1 *Lutw.* 234. was a case even in pleading.

Maxim of law.

* P. 47.

The law will, as much as it can, assist the frailties and infirmities of men in their employments, who in drawing long deeds may easily make a slip. The case at bar is the case of a bargain and sale, where the consideration of money carries so violent an intendment, that a grant to a man upon a valuable consideration without saying *for his heirs*, shall yet give him a fee, which is much stronger than the case at bar, because *there* without such a construction, there would have been a *quid pro quo*, an estate for life, and the grant would not be altogether void, as here it would.

Court of opinion, the deed was good. Had this been a *tripartite* deed, without this slip, there had been no doubt at all in the case: but the deed is *tripartite*, and *both* in the singular number, and therefore all the doubt is to *whom* the *both* refers.

Salk. 462.

3 Salk. 74.

1 Mod. Cases

in Law and

Equity 342.

Deeds are to be interpreted, as much as possibly, according to the intention of the parties. The case in 2 *Ventris* 196. was a case upon pleading, where greater strictness is required, and therefore does not come up to the case in point. The case in 2 *Ventris* 141. does. Many are the instances where the penalties of bonds are put into very strange and even false *Latin*, and yet held good. The case in question is the case of a bargain and sale, and therefore to be interpreted more favourably than a deed. By the common law nothing passed by deed of bargain and sale but the use, and remedy was only in Chancery; but now statute law has passed the estate to the use. The intention of the deed is plain, if this deed does not make Lord Say grantor, as to him it would have no effect at all, who yet sealed it. According to the common rules of indenture, the * words of the deed are the words of all the parties, but Lord Say is a party, therefore he has granted.

* P. 48.

The

Michaelmas Term 10 Ann.

The truth of the matter was, that it being feared this slip in the deed would be fatal to the recovery, this other contrivance of the fine was judged to be the best way of supporting it. Though the opinion of the court was clear and plain for the plaintiffs in both points, yet the Lord *Say* and *Seal* prayed a bill of exceptions.

Motion for mandamns to Sir Gilbert Heathcote, Lord Mayor of London. B. R.

THE court of Queen's Bench was moved for a *mandamus*, to Salk. 670. Fort. 283. The learning of mandamus's. be directed to Sir Gilbert Heathcote, late lord mayor of the city of *London*, to return such and such persons, by name, to the court of aldermen as the persons chosen by the wardmote of *Broadstreet*, or to shew cause why he would not. Now Sir Gilbert had in fact made a return, but a return of different persons, (as to three of them) than what (the counsel moving said) appeared upon the scrutiny to have been really chosen.

Arguments for the *mandamus*.

It was said that they were before a court, that had a jurisdiction over all inferior magistrates whatsoever, to compel them to do their duty. That as it would without doubt be proper to apply to this court, should a lord mayor refuse to hold a court of aldermen, or refuse to make any return; so it was no less proper in the present case, where he makes a false one.

If it be objected that the proper remedy lies in the court of aldermen, the answer is, that the lord mayor presides over that court, & *nemo debet esse * judex in propria causa*; and though it * P. 49. Maxim of law. may here be said, that the lord mayor, who made the return, is out of his office, yet this in general must be precarious and uncertain; it might have been otherwise, and a legal remedy ought to be certain in all events. If the court of aldermen are the final electors, and have also a power of allowing or disallowing returns, they will have an absolute power of choosing whom they please; whereas according to the ancient custom and practice, they are only to choose one of the persons returned to them. It is true the court of aldermen have rejected returns, upon the account of the insufficiency of the persons returned; or where the return has either fallen short, or exceeded the just number, as when five or three have been returned; but not because of its being a false return. But supposing the court of aldermen have a jurisdiction, why may not this court have a concurrent one? It was confessed that this was an unprecedented *mandamus* that was desired: But then (it was said) the reason was, because no lord mayor before had ever made so bold an attempt upon the liberties and privileges of the city; and as there was no precedent for the *mandamus* desired, so there

Michaelmas Term 10 Ann.

was no instance to be found, in which such a *mandamus* had been denied.

Then several cases were quoted, where the court (though doubtful whether a *mandamus* lay) had yet granted a *mandamus*, in order to consider further upon the return. 1 *Levinz* 121. Duke of Ormond's case. Dr. Blitbe's case. And if the court will act so in cases, comparatively speaking, of a private nature, much more will they do so in offices of a publick nature, as that of an alderman of the city of London.

Arguments against the *mandamus*.

* P. 50. *First*, It was said that the custom, generally, was for the person injured to pray for a *mandamus*, and the words of the writ are *ad damnum* of those that are chosen; * whereas in this case, the counsel moving for the *mandamus*, are counsel for the city.

Then it was insisted upon, that there was no occasion for this *mandamus*, for that the lord mayor was only a ministerial officer, and the court of aldermen were not concluded by this his return.

Custom of London.

By the custom of the city, founded upon the by-law of Hen. IV. they are to choose one of the persons *chosen*, not one of those *returned*.

Court of aldermen, their power over returns.

To prove the authority and power of the court of aldermen over returns, the following instances were produced: 2 *New*. 1696, Sir John Moor was returned two several times to the court of aldermen, and as often rejected; and the court of aldermen proceeded to a new election themselves, without any more returns. 13 *July* 1699, they ordered a new return to be made for *divers reasons* only, not saying what. 30 *Jan.* 1694, a new return was commanded for *disorderly proceedings*.

In the case of *Queen-Hitbe*, the record says *ideo consideratum est per curiam*, that this return be rejected; and when five or three have been returned, the court of aldermen have rejected them. If now, such an over-ruling power has been exercised over returns, by the court of aldermen, this court will not, certainly, interpose, and deprive the court of aldermen of their right in this matter.

The common reason why *mandamus*'s concerning fellows of colleges have been refused, *viz.* because their proper remedy was to apply to the visitor, will hold in this case.

But supposing the return did conclude the court of aldermen, yet the court will never grant a *mandamus* in this case, because four are already returned. Should the court direct a *mandamus* for four more to be returned, such a command would make the lord mayor subject to actions upon the case, for false returns; for one return must necessarily falsify the other, it being impossible that both can be true.

* Suppose

Michaelmas Term 10 Ann.

* Suppose Sir *G. H.* in obedience to such a *mandamus*, returns another four, the consequence is, the court of aldermen will have two returns before them; and either they have a right to examine which was the true return, or they have not; if they have not, they can do nothing; if they have, then they may now examine into this present return, and reject it if they see cause. * P. 51.

Acceptance necessary to a return, and this return being already compleat by acceptance of the court of Aldermen, another cannot now be made.

Judge *Eyre* proposed, an objection to this *mandamus* for the consideration of the counsel.

The objection was, that no instance could be produced, where obedience to a *mandamus*, shall expose a man to any trouble or inconvenience. Whereas in this case, if Sir *G. H.* obeys the *mandamus*, he will be liable to an action for a false return to the court of Aldermen: but if he returns, that the persons already returned, are those that were truly chosen, he will be liable to an action, for a false return to the *mandamus*, and afterwards to an action for a false return to the court of Aldermen; for the one action and verdict cannot be given in evidence in the other action.

Reply by counsel for the *mandamus*.

As for that objection against the *mandamus*, that the court of Aldermen had a power over the return, and that therefore this court ought not to interpose, any more than they will in the case of a fellow of a college, where there is a visitor; they said the difference taken in the famous case of Dr. *Perry*, Bishop of *Exeter*, which passed the house of Lords, would answer that objection; viz. that as to such corporations, as were erected for private ends only, the court would leave these to visitors and not interpose, as in the case of colleges, &c. *contra* as to corporations founded upon publick accounts, as for the government of great cities, * &c. and in the * P. 52. case at bar, the metropolis of the whole kingdom was concerned.

They said it was very unreasonable, that the court of Aldermen, should have an absolute power over returns, and be final electors too; for then, in effect, they have the intire election in themselves, and the liberties of the city are precarious, depending upon the pleasure of the court of Aldermen.

As for the instances produced, of the power of the court of Aldermen over returns; five of them only were insisted upon, and in some of them, the returns carried along with them evident marks of error, as where three or five were returned. The rest were instances of such nature, as would make one sorry that such a power should be placed in such a court, if so it is, as where they rejected a return for *divers reasons*, and another for *disorderly proceedings*.

To

Michaelmas Term 10 Ann.

To the objection, that the power of the Lord Mayor was already executed, and the return made; it was answered, that the force of this objection only amounted to this, that an officer because he has done wrong must not do right: That the first return if wrong was a nullity, and no return at all: that this would be an objection against all *mandamus's*; and that by this rule an archdeacon might return to a *mandamus*, that he had sworn in such a one, that his power was executed, and therefore he could not obey the *mandamus*.

* P. 53. To the objection, that this *mandamus* would expose Sir G. H. to actions, whether he obeyed it or made a return to it, in which it differed from all other *mandamus's*; it was answered, that if he obeyed the *mandamus*, as he ought if he has already done wrong, that it was his doing wrong and not his obedience to the *mandamus* that exposed him to actions: that, if he had done right, in case of disobedience to the *mandamus*, no action could be successfully brought against him; for that, in these commandatory writs, there is always an alternative; * *si ita est* says one, *si vobis constare poterit* says another, and this writ now in debate, *vel causam nobis significes*; in all which cases, the first part of the writ is only to be obeyed if true. Some special cases there are, wherein officers may be liable to actions, meerly for executing the process of the law; but in no case, can an action be carried on successfully, in case he has behaved impartially. For example, upon a *feri facias* directed to a sheriff, put the case there are goods, in which (as it often happens) others claim a property; in this case whether he returns *feri feci*, or *nulla bona*, (and one he must) he will be liable to an action. But if it shall appear that he has acted fairly and indifferently, the law shall secure him whatever return he makes, and whether his return be true or false.

Bonds taken by a sheriff to indemnify him, in such a case, have been held good.

As to that part of the objection, that this distinguishes this case from all other *mandamus's*; they supposed the law to be otherwise, and that should an archdeacon, in obedience to a *mandamus*, swear in a wrong person, he would be liable to an action.

1 *Rolls* 108. was cited, where it was said, that an action lay against an archdeacon for not inducing a clerk.

Instances were urged, wherein court though doubtful granted *mandamus's*; and it was said that they were better spoken to, and with more certainty upon the return.

Mandamus's founded upon *Magna Charta*, cap. 29.

The last day of the term, the court, viz. the three Judges then present, delivered their opinions *seriatim* to the following effect.

Michaelmas Term 10 Ann.

Judge Eyre.

The question is, whether the court ought to grant the *mandamus* desired? the design in asking it, is said to be, not so much for the sake of deciding the * present controversy, as to know what remedy * P. 54. the inhabitants of a ward have, to be represented by one of the four truly chosen by them, in the court of Aldermen. It is agreed, that the wardmote are to choose four and return them to the court of Aldermen; and that the court of Aldermen are to be the final electors, for they are to choose one of the four. It is agreed, the court of Aldermen have quashed returns; sometimes for the number and insufficiency of the persons returned, sometimes for irregularities in the choice. It must likewise be agreed, that this court has a general jurisdiction in this matter, and is to take care, that publick offices be discharged by persons, that are duly elected; and that *mandamus's* have been the way, whereby this power has been generally executed. I agree therefore, that unless some *mandamus*, I say some *mandamus*, will lie in this case, there is no remedy; for as for actions upon the case for false returns, they lie only in damages, but can never restore the persons wronged, to the possession of their right.

It ought to be the concern of a court of justice to take care, that whilst they are granting a remedy to one, they do not at the same time expose others to great inconveniencies; and likewise, that the remedy be such, as may prove effectual.

Bag's case in 11 Co. Rep. and the last *mandamus* act, do not concern the present question; for the former treats of *mandamus's* in general, and the latter only speeds the proceedings upon *mandamus's*, but does not give any new *mandamus*.

It is confessed of all hands, that the *mandamus* desired is without a precedent; all *mandamus's* being either to restore persons turned out, or to admit those refused. I say not this, by way of objection, against the *mandamus*; but only to shew, that the reason of other cases, must be our guide. Cases quoted have been of *mandamus's* to archdeacons to swear in church-wardens, or to corporations to admit burgesses: but these cases cannot warrant * this *mandamus*; * P. 55. because this is a *mandamus* liable to greater inconveniencies, and less effectual than either of those; for an archdeacon is perfectly safe in obeying a *mandamus* directed to him: But here in the case before us, obedience to this *mandamus* (supposing him to have done right already) will be no defence in an action upon the case for a false return, for it would be of very dangerous consequence that it should; for 1st, the persons being named in the *mandamus*, is no evidence of their being chosen, but is barely the suggestion of the party; and 2^{dly}, the consequence would be, that the person who should be so diligent or fortunate as to get the first *mandamus*, whether chosen or not chosen, could not be removed.

Michaelmas Term 10 Ann.

Though no case has been quoted to shew (and the reason I am sure is because there are none) that an archdeacon swearing in a wrong person, in obedience to a *mandamus*, was liable to an action for so doing; yet it has been attempted to be proved, that in the reason of the thing an action ought to lie; and for this purpose it has been said, that an action will lie against an archdeacon for not admitting, or refusing to swear in, &c. But certainly it does not from hence follow, that obedience to a mandatory writ of this court will subject him to an action. Further yet, this *mandamus* may possibly expose Sir G. H. to a double vexation. Suppose he returns that the persons before returned were truly chosen, he will be liable to an action for a false return to the *mandamus*, and likewise to an action for a false return to the court of Aldermen, for the evidence given in one action will not be evidence in the other.

This objection receives an additional strength from the late *mandamus* act, where there is a special clause to secure men from double vexation.

* P. 56.

But the greatest objection against this *mandamus* is, that it must prove vain and fruitless; whereas in all other cases the *mandamus* is an immediate and effectual remedy; for the court of Aldermen cannot be bound * by the proceedings upon this *mandamus*, being strangers to it; and consequently, according to the verdict given upon the trial in a second *mandamus* to the court of Aldermen, and without any regard to the trial, proceedings and verdict upon the first *mandamus*, it is, that the peremptory *mandamus* must go, so that to me it seems to have no effect at all. It is highly proper there should be a remedy; but for these reasons, I cannot think this a proper remedy.

The *Abingdon* case, as appears to me, points out the *mandamus* that ought to go in this case.

By the constitution of that corporation the freemen were to choose two, and present them to the mayor, aldermen and burgessees, who were to elect one of them: Now in this case there was a *mandamus* granted to the mayor, aldermen and burgessees, suggesting that such a one, and such a one were the persons chosen, and commanding them to choose one of them. That the court of Aldermen are to elect one of the four, chosen by the wardmote, and not one of them returned by the lord mayor, is very plain from the power by them exercised over returns. Now therefore, as appears to me, we should grant a *mandamus* to the court of Aldermen, suggesting such four to be chosen, and commanding them to choose one of them. This seems to me not liable to those objections and inconveniencies the other way is attended with, and also answers that objection rationally started, that they are in truth the sole electors. Besides, supposing the court of Aldermen have, as is pretended, such a power over returns, they are the properest persons to return their own privileges. As to the objection, that the lord

mayor

Michaelmas Term 10 Ann.

mayor presides in the court of Aldermen, and, having a power to adjourn the court at pleasure, may prevent any return ungrateful to him; the answer is, that in so doing he would be guilty of a contempt; and so would the court of Aldermen, should they refuse to obey, or return to the *mandamus*.

* Judge Powys.

* P. 57.

I am of opinion this *mandamus* ought to go. *Bag's* case is said to have been the beginning of *mandamus's*; but certainly they are of much greater antiquity: in *Dr. Widdrington's* case, 1 *Levinz* 23, they are said to have been as old as *Ed. 2.* and *Ed. 3.*

There have been positive affidavits read of misbehaviour, which is ground enough for us to look into it.

My Brother *Eyre* has owned, that there is no way of coming at this matter, but by a *mandamus*.

I cannot see of what use a *mandamus* directed to the court of Aldermen would be; for they can do nothing upon such a *mandamus*; the persons not coming before them in a legal way, viz. by the return of the lord mayor. Besides, to grant a *mandamus* at first to the court of Aldermen, would be to proceed *per saltum*, neglecting the proper degrees to be observed in this matter.

But it is objected, that an application to the court of Aldermen is the proper remedy: I answer no; for that would be to appeal from the lord mayor to the lord mayor, for he presides in that court, and can hold or adjourn it at pleasure. It is out of that court the lord mayor is chosen, and as every member there lives in expectation of the chair in his turn, that court will consider the privileges of the lord mayor, as their own. It seems very unreasonable that the same body of men, should be to choose out of the return, and have an absolute power over the return too. There have indeed, been instances produced of their power over returns, some of which did not come up to the point; and one was of so arbitrary a nature, as was never before practised, nor I hope ever will again.

It is objected, that Sir *Gilbert* has already executed his power, and would you have him do it over again? a strange objection! where an officer's having done wrong, is used as an argument against his being obliged to do justice. * Suppose meer strangers had been returned; must this have been looked upon as an exercise of his power? no certainly; a false return is no return. Would it be a good return for an archdeacon to say, I have already sworn in a wrong churchwarden, therefore I cannot obey the writ? no, it would not. *Mandamus's* are never peremptory; but have always a disjunctive, *vel causam nobis significes*. If he has made a return, and a true return, he may return *non electi*: but if these men are really chosen, it is absolutely necessary for them to be returned; since that is the only legal way, by which they can be brought before the court of Aldermen. It is objected, that this *mandamus* will be ineffectual: I say
no;

* P. 58.

Michaelmas Term 10 Ann.

no; for it will have its proper effect, which is not, that these men should be aldermen; but put in a capacity of being so, by being returned.

As to Sir G. H.'s being exposed to actions; nay to double vexation; *that* is not to be put in the scales with the peace and quiet of the city. In the next place, no action can be brought against him successfully, in case he has done right. And in case of double vexation, the damages a jury would give upon such a second trial, after the merits had been fairly tried before, would be inconsiderable. But it is objected, that the *mandamus* desired, differs from all others; they being either to admit or restore, but this for a possibility only: I say not; for it is for a nomination.

* P. 59. Thus much of the *mandamus*'s lying *de jure*: but now supposing it doubtful; yet I think we ought to grant it. Many are the instances, where this court have granted *mandamus*'s in doubtful cases; 1 *Sid.* 169, treasurer of the New River water. 1 *Levinz* 23, fellow of a college; and 2 *Levinz* 14. All cases of *mandamus*'s granted *besitante curia*; and the ground they went upon was this, that it would be better spoken to upon the return. Now, if this court has acted thus, in matters of an inferior nature; *a fortiori* will it do so in a case of * this importance. The return of Sir G. H. may give some further light in the matter: if we should err in granting this *mandamus*, the error retrievable; it may be quashed, *erronice emanavit*. But supposing there is another remedy, that is no objection; for the law in many cases gives a double remedy; as suppose a clause in a will, that whatever controversy shall arise upon the construction of it, shall be decided by such and such arbitrators; the parties will have their election to decide their controversies, either by arbitrators, or by law.

Chief Justice Parker.

This being a case of consequence, I shall not only give my opinion; but freely declare *that*, which seems to me the best and properest remedy in this affair.

Among the instances produced, to prove the power of the court of Aldermen over returns, one was their rejecting a return, because the lord mayor, Sir Samuel Garrard had refused a poll.

This, I suppose, they did upon a complaint brought before them; which seems to me in this case, the most proper remedy. The effect of this *mandamus* is, to have such and such returned; the consequence of which will be, the court of Aldermen will have seven before them; and then they must consider, who the four were, that were chosen by the wardmote, that so they may choose one of them: for unless they do this, there must go another *mandamus* to the court of Aldermen; the consequence of which is, that this election may come to be tried twice; viz. upon the return of Sir G. to his *mandamus*, and of the court of aldermen to theirs; so that

Michaelmas Term 10 Ann.

this way the right may not, possibly, be settled without much expence and length of time.

When persons are falsly returned, the proper way is, for the persons grieved to complain to the court of Aldermen for redress; and if they refuse, then this court will grant a *mandamus* to the court of Aldermen, * who are the properest persons to return their own privileges. * P. 60.

As for the *mandamus* desired, two things to be considered, 1st, Whether it lies? 2^{dly}, Whether it ought to be granted; in case it be doubtful whether it lies, or not?

As to what has been said concerning the jurisdiction of this court, *that* is out of dispute. But though a court has jurisdiction, yet it ought not to be exerted, but where it is necessary; and if the court of Aldermen are to choose one of the four elected by the wardmote, and not returned by the lord mayor, then sure I am that this *mandamus* cannot be necessary; for then it will be just the same thing, whether the persons chosen come before the court of Aldermen, by way of complaint, or by the return of the lord mayor, in obedience to this *mandamus*. As this *mandamus* is unnecessary, so will it be uneffectual; for the end of it is only to bring the persons chosen before the court of Aldermen, which may be done as well by complaint of the persons injured. And after this *mandamus* granted, the aldermen must do just the same thing, they are bound to do now upon complaint, *viz.* consider which are the persons chosen by the wardmote. The darkness complained of in the scrutiny, only prevents that examination, which upon a complaint may be had. One difference there is between proceeding by complaint and *mandamus*, that the former is more compendious and less expensive.

Now, as to the persons that may be affected by this way of proceeding: to begin with the court of Aldermen; they will be under a necessity of returning their own privileges to a *mandamus*, consequent of this now asked; or, no means being left them to know which were truly chosen, of obeying the writ blindly, without knowing whether they do wrong or right.

* As for Sir G. if he obeys the writ, he is subject to an action for * P. 61.
a false return to the court of Aldermen; and no instance yet has been produced, where obedience to a mandatory writ of this court exposes a man to an action. If he returns *non electi*, he is liable to an action upon both returns.

Actions have indeed been brought against an archdeacon for refusing, but never (as my brother *Eyre* has observed) for paying obedience to a mandatory writ of this court.

It has been objected, there are some cases, wherein persons by meer executing the process of the law may become subject to actions: but surely, such a consequence is a very good reason for not giving way to an unprecedented process; unless otherwise there would be a failure of justice.

Michaelmas Term 10 Ann.

It has been objected, that it is highly unreasonable for the same persons, to be judges of the goodness of the return, and to choose one of them too: I answer it is unreasonable, that they should be at liberty to take which four they please; but not at all, that they may consider which of the parties were really elected. It does by no means follow, that because they are the final electors, that therefore they are not the proper judges to do right, and judge which four were duly elected; and if they do wrong, then is the proper time for this court to interpose by granting a *mandamus*.

Indeed it has been said, that a *mandamus* will not lie, in the first place, to the court of Aldermen; that the aldermen have no authority but upon the return of the lord mayor, and consequently that a *mandamus* to the court of Aldermen can be of no use, unless it be subsequent to the *mandamus* to Sir G. H. This objection supposes, the court of Aldermen concluded by the return of the lord mayor; and if this be so, then there is no way to let these persons into their right, but by setting aside the return already made; which
* P. 62. cannot be done * by *mandamus*, but by action of deceit only. Even in the case of a sheriff, where the return is into our own court, no way of doing it, but by deceit; much less can it be done in the case of a return to a foreign court. If this be so, the *mandamus* will signify nothing; for the court of Aldermen will be concluded by the first return.

I was once considering, whether a second return, made in obedience to a *mandamus* of this court, might not vacate the former: but then, I saw, this inconvenience would still attend the court of Aldermen being bound by the return, though this should be so; viz. That if a return should be made in the long vacation, then such a return though a false one, and evidently so, must yet conclude the court of Aldermen; it being then impossible to apply for a *mandamus*.

But another absurdity ensues from this opinion, viz. two conclusive returns: I say two; for if the last is not a conclusive return and the former is, this *mandamus* is vain; and if the first be not conclusive, why should the last?

But this opinion is confuted by the by-law of Hen. 4. which directs them to choose one of the four chosen not returned. Likewise all the instances produced, of the power of the court of Aldermen over returns, confute this fancy. In short, the way by complaint is a compendious one; that by *mandamus*, long and intricate: for upon these two *mandamus*'s, viz. that desired, and the subsequent one to the court of Aldermen, there may be contrary verdicts; which will leave it at last doubtful, whether right is done or not.

As to the second point, whether the court may not grant this *mandamus*, though doubtful whether it lies, or not; there is no doubt,

Michaelmas Term 10 Ann.

doubt, but this court have granted *mandamus's*, when doubtful: but as they may grant, so, most certainly, they may refuse; which I think we ought to do in the present case, where the granting of it will * probably long continue that confusion in the city, that a little good advice may soon put an end to. * P. 63.

Queen and Williams. B. R.

See Salk. 384.

HUSBAND and wife indicted for keeping a bawdy-house.

Husband and wife indicted for keeping a bawdy-house.

Moved in arrest of judgment, that husband and wife could not be jointly indicted for keeping a bawdy-house. 2 Rolle 8. Brook's case.

But it was answered, that the indictment was not only for keeping a bawdy-house, but for procuring lewdness, &c. That crimes are in their nature several: that husband and wife may be found guilty of nuisance, battery, or the like: That the reason why in burglary, larceny, &c. wife is excused is, because she could not tell what property the husband may claim in goods, &c.

Hilary term 2 Annæ, James Cook and his wife jointly indicted for keeping a bawdy-house; husband fined, wife set in the pillory.

Court: Indictment good; keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband.

D'aeth and Baux. B. R.

THE court was moved for a prohibition, to the spiritual court, for suffering a feme covert to sue *singly* upon the statute of distributions; because it was for a property, so vested in the husband, that it might be released by him. Prohibition.

* The court said no prohibition lay, for this was a *chose in action*, * P. 64. and so much the wife's that she shall have it by survivorship; and if the husband had been joined in the suit, it would have been only for conformity. This case differs not from the case of a legacy; for which, it is the course of the spiritual court to admit feme coverts to sue alone: but, supposing it was not the practice of the spiritual court to suffer a feme covert to sue without her husband, the party's remedy is by appeal, not prohibition.

However a short day being given to shew cause,

Upon the last day of the term, Dr. Pinfold argued against the prohibition: because it was a case, where the spiritual court had confessedly

Michaelmas Term 10 Ann.

In what cases a feme covert may sue alone in the spiritual court.

fessedly a jurisdiction, and therefore they ought to proceed according to their own rules; that according to these, a woman, though a feme covert, was admitted to sue sole in every one of the following cases, viz. when executrix, when administratrix, when legatee, when legatary, when defaming, when defamed; that if this were not so, the party should have appealed, not moved for a prohibition.

The most material thing replied to this was, that though the ecclesiastical courts had jurisdiction in this matter, yet deriving this jurisdiction from the temporal law, viz. the statute of distributions, they ought to conform their proceedings to the rules of common law. The court said, so they ought in matters of substance, but not form, as this most certainly was.

Whitehorn Mayor of Portsmouth. B. R.

Information in nature of a quo warranto.

THIS was an information in nature of a *quo warranto* against *Whitehorn*, for exercising the office of mayor in the town of *Portsmouth*; and against others for exercising the office of aldermen.

* P. 65.]

* *Whitehorn* pleads the charter of King *Charles I.* incorporating the town of *Portsmouth*, &c. and sets forth a particular clause in the charter, whereby it is declared, that if the mayor should die, or for just reasons be removed, it should be lawful for the aldermen to choose another mayor for the remaining part of the year, until the time to elect came about again; then he sets forth that the mayor died, and that he was chosen by the majority of the aldermen, *secundum formam chartæ prædictæ*. The Attorney General replies *non electus modo & forma, &c.*

The aldermen plead their being chosen under the mayoralty of *Whitehorn*. Issue joined upon *non electi modo & forma, secundum formam chartæ*.

Upon trial at the assises, it was insisted, that the defendants, to prove the issue, must first prove themselves qualified, by receiving the sacrament according to the act of King *Charles II.* which point, instead of being found specially, was saved by the judge who tried the cause.

Substance of an argument for the defendants.

It was said, that this act of parliament could not be understood to make elections void, but voidable: That the act was made for regulating, not disturbing corporations; as it would do, if it made all elections of persons not qualified, according to it, nullities.

Michaelmas Term 10 Ann.

That there were other statutes with words altogether as strong as those used by this act, which have yet received such an interpretation.

The *stat. 5 Ed. 6. cap. 4.* says, that the offender shall be *ipso facto* excommunicated; yet a precedent conviction has been held necessary. Stat. 5 Ed. 6. cap. 4.

* It was said, that acts done by officers *de facto*, though not *de jure*, in execution of their office, are good, *Cro. Eliz. 669. Harris versus Jays. Cro. James 552.* If therefore *Whiteborn* was a *de facto* mayor, that was enough to support the election of the aldermen. * P. 66. De facto officers.

Supposing upon a general issue, of *electi vel non electi*, it would have been incumbent upon the defendants to prove themselves qualified, by taking the sacrament; that yet upon this special issue of *electi vel non electi secundum formam chartæ*, this could not be necessary, the charter being altogether silent as to these qualifications.

When issue is joined upon a plea, no advantage shall be taken of any matter collateral, *2 Anderson 82. In Hobart 72.* upon an issue *feoffavit vel non*, the jury found a feoffment, but a covinous one; and the court was there of opinion, that upon this issue a covinous feoffment was a feoffment; and that if the party would have taken advantage of the covin, he ought to have done it by special pleading. It is there likewise said, that a *non est factum* cannot be pleaded upon the statute of usury, or sheriff's bonds; nor can a letter of attorney by an infant be avoided without special pleading; the reason of all which cases seems to be this, that these things have the appearances of feoffments, bonds, &c. though they want the validity.

As it would have been no evidence, upon this issue, to have shewn a title by a subsequent charter, not reasonable the other side should take advantage of a subsequent act of parliament.

Earle and Peale. B. R.

Salk. 386, 387.

THIS was an action brought upon a note, for money lent an infant for his support and maintenance.

Infant, how far his contract for necessities good.

* After a verdict and judgment for the plaintiff, upon error brought in B. R. it was argued that this action did not lie. * P. 67.

1 *Inst. 172.* it is indeed said, that an infant may bind himself to pay for his necessary meat and drink: But this was never carried farther: 2 *Cro. 497.* it is held, that the contract of an infant for wares for the necessary carrying on his trade, whereby he subsists, shall not bind him. 3 Salk. 196.

It was agreed by the other side, that in case the money thus lent upon this note was not actually laid out by the infant for necessities, the plaintiff could not recover upon it: But, it was said, the plain-

Michaelmas Term 10 Ann.

tiff could never have obtained this verdict, without first proving that the money was actually so laid out.

Court: There is a great difference between lending an infant money to buy necessaries, and actually seeing the money so laid out. In this case the lending for such a purpose only put in issue, which might be maintained without shewing how the money was actually laid out; that if the fact was so, the plaintiff should have declared as for money so laid out, and not so lent. The law knows of no contracts but what are good or bad at the time of the contract made; and not to be one, or other, according to a subsequent contingency. Accordingly next term the judgment was reversed *nisi*.

Salk. 279.

Salk. 374.
S. C.

Amendment
of writs.
Elegit.

Dummer *versus* — B. R.

THE court was moved to amend an *elegit*, that sets forth that judgment was given upon the 9th of *January*, when in fact it was given upon the 23d of *October*, and signed the 9th of *January*.

* P. 68.
Writ of in-
quiry.

* Cases cited in behalf of the Motion; *Cro. Jac.* 372. *Cro. Eliz.* 677. where writs of inquiry, which are judicial writs, are held amendable. *Vavasor's case*, *Hil. 6 Ann. Herby and Whitlock*, about the same time in *C. B.* 44 *Ed. 3. Brook, Elegit*; where an *Elegit* held amendable.

Court of opinion not amendable, because it might occasion an alteration in a verdict upon a writ of inquiry; for between the 23d of *October* and the 9th of *January*, he might have lands that he had not the 9th of *January*. *Adjournatur*.

6 Mod. 95.
Holt 366.

Queen and Wooton. B. R.

Justices of
peace.
Their jurisdic-
tion about
servants
wages.
Salk. 441,
442.

JUSTICES of peace have no jurisdiction to judge of wages except in case of husbandmen: But yet the court, in favour of servants, will always, unless the contrary appears upon the face of the order, presume servants to be servants in husbandry, and will admit of no collateral proof to the contrary.

Dr. Harrison and Archbishop of Dublin. B. R.

Visitation.
Bishop, not-
withstanding
appropriation,
may visit and
suspend, but
not deprive.

THIS was a writ of error out of *Ireland*, and the question was, whether or no the appropriation of a rectory to a priory, or a dean and chapter, did exempt this rectory from the visitation of the bishop, in whose diocese it lay; and if it did not, whether he might not upon visitation, proceed to the suspension of the

Michaelmas Term 10 Ann.

the incumbent *ab officio & beneficio*? Deprive him, it was clear he could not.

The court seemed of opinion that the bishop, notwithstanding the appropriation of the benefice, might * yet visit to see how the church was served, sacraments administered, &c. and might proceed to suspension. *Adjournatur*. * P. 69.

Stafford and Beneath. B. R.

AN action of debt for 15*l.* the plaintiff declares upon two demises, and that upon the one demise there was 10*l.* rent behind, and upon the other 12*l.* To this the defendant demurs. Afterwards the plaintiff enters a *remittitur*, for all that appears due from the declaration, over and above the 15*l.* demanded in the writ.

Remitter.
Debt.
In actions upon specialties or contracts, where the sum is certain, the plaintiff cannot abridge his own demand, without shewing how the rest is satisfied. Contra in actions that lie in damages.

It was argued for the defendant, that supposing the declaration naught, the *remittitur* would not help it. 1 *Saunders* 285. *Duppa* and *Mayo*, where it is expressly resolved, that a *remittitur* in such a case would signify nothing at all; and the reason given for it was, because a man that had a good cause of demurrer, at the time of his demurring, might by this means be tricked out of it. To prove the declaration bad, this ground was laid down, that in an action of debt for rent, the plaintiff cannot abridge his own demand, without shewing how the rest was satisfied. 2 *Cro.* 499. *Pemberton* and *Shelton*, this difference is taken, that where an action is grounded upon a specialty, or upon a contract where the sum is certain, or upon a statute which gives a certain sum for the penalty, no demand can be of a lesser sum, without shewing how the rest was satisfied: but where a person, if he recovers, is to recover not a sum certain, but according to what a jury will give; not according to his demand in the declaration, but according to the verdict; there it is otherwise. 1 *Cro.* 447. *Thornton v. Kemp*, the abating of 10*l.* not shewing how, adjudged naught. 2 *Levinz* 4. *Hulm v. Sanders*, action of debt for rent, demand was * for 100*l.* and by the declaration it appeared that 111*l.* was due; the court were of opinion, though after a verdict, that the judgment ought to be reversed. 2 *Levinz* 57, Judge *Hales* took the difference between covenant and debt before mentioned in 2 *Cro.* 499. and held, that even in covenant, upon special demurrer, such demand was naught. * P. 70.

Court of opinion for the defendant: And thought the difference taken between actions brought for a sum certain, and actions that lay in damages to be good law. They said, that upon this declaration, they could give judgment for no less than 22*l.* which is more than was demanded in the writ.

Michaelmas Term 10 Ann.

As for the *remittitur*, if that could have altered the judgment, the court might have done it without.

Judge *Eyre* desired the counsel, before they spoke to it again, to consider of two cases, that he took to be cases in point for the defendant, *viz.* *Cro. Eliz.* 308. *Cro. Eliz.* 434. *Adjournatur.*

Queen and Morgan. B. R.

Stat. 5 Eliz.
about trades
expounded.
Salk. 67.

RESOLVED *obiter* by the court upon the 5th of *Eliz.* about trades, that serving five years to a trade out of *England*, and two in *England*, was enough, and satisfied the statute. But there must be a service of a full time either in *England*, or out of *England*: therefore serving five years in a country, where by the law of the country more is not required, will not qualify a man to use the trade in *England*.

A wife living with her husband seven years, may after his death continue the trade, for the act does not require a man or woman to be an actual apprentice; but the words are *tanquam* an apprentice.

* P. 71.

* If a man lives with another that uses a trade, which other is not qualified for using it seven years, he may set up the trade as well as if he had lived with one never so well qualified.

Anonymous. B. R.

Writ de ex-
communicato
capiendo.

Objections
against it
over ruled.

MOVED to quash a writ de *excommunicato capiendo*.
1st Exception was, That the writ says only *causa defamationis*, but does not say what defamation; now there are some defamations that are not of spiritual conuzance: this objection overruled by the court, who said, they would not presume, that any court would exceed its own jurisdiction, unless it appeared plainly it had done so.

2^d Exception was, That the standing 40 days excommunicated, did not appear in the writ; *sed non allocatur per cur.* for the 40 days never inserted in the writ, but the *significavit* only: besides, this objection not proper here, but in Chancery; the 40 days excommunication being the very foundation upon which the court grants the writ.

3^d Exception: There must be a proper addition; now the word was *chiotbecario*, instead of *chirothecario*; *sed non allocatur.*

Thomlinson

Michaelmas Term 10 Ann.

Thomlinson and Dighton. B. R.

LORD Chief Justice *Parker* gave the resolution of the court to See ante 31.
the following effect :

Questions two,

1st, Whether the wife by this devise took an estate in fee, or for life?

2^{dly}, Whether her power was well executed?

* As to the 1st, All of opinion, that she took but an estate for * P. 72.
her life. *First*, Because the will expressly gives her an estate for Estate for life.
life. *Secondly*, The power of disposal does not at all alter her estate,
because it is a distinct clause. Cases relied upon by the court for
their opinion in this 1st point; 3 *Leonard* 71, upon which great
stress was laid. 1 *Jones* 137. *Daniel and Uply*. 2 *Levinz* 104,
devise to a wife for life, with a power to dispose of it to which of
her children she pleased.

2^{dly}, We are all of opinion, that the power is well executed.

For as to the 1st objection, that the power was extinguished by Power well
the fine; it may be answered, that if the power was well executed, executed.
it was executed by the deed, which was antecedent to the fine;
and therefore it is impossible for the power to be extinguished by
the fine.

As to the 2^d objection, that the power ought to have been executed by will, and not by deed; which is built upon the word *then*, importing, as they say, that very instant of time, when her estate determines; *then, and not till then*, her power enables her to dispose, and which must necessarily be done by will.

To this objection we answer, 1st, That the words of the power do not expressly mention any particular way of conveyance, by which this power should be executed, but leave it indifferent. *Hobart* 312, *Dicitur*, that all forms and circumstances of powers are to be observed; but then it is added, that this is to be undertook of such forms and circumstances as are expressed, not imagined: now here no particular sort of conveyance is expressed. That case last mentioned in *Hobart*, was indeed the reverse of this; for there the question was concerning the power of revocation, but here * of the execu- * P. 73.
tion. However it fits the present case; for there the question was, Whether a revocation could be executed by will; for from the words of the *proviso, then and thenceforth*, it was argued, that no revocation could be good, that was done by will; for a will (as was said) is revocable, and is of no force at all until the death of the
O testator;

Michaelmas Term 10 Ann.

testator; whereas (it was urged) the *proviso* says *then*, and from *thenceforth*, viz. from the time of sealing, &c. the uses shall be revoked, which a will cannot do. But the court held the power of revocation might be executed by will, and that the words *then* and *thenceforth* should be rejected as surplusage.

2dly, The word *then* refers to the remaining of the lands, and not to the time of the disposing them, viz. that *then* her disposal, *when* so made, shall take effect.

3dly, *Then* is equivalent to *after her death*, which shews it cannot be done by will. 3 *Leonard* 71.

3d *Objection*: That it was executed by a conveyance to the parties, and not trustees. *Resp.* These powers are executed by all sorts of conveyances. 1 *Rolls* 329, *Dike and Rich.* 1 *Ventris* 228, *King and Melling.*

4th *Objection*: This conveyance left in her an estate for life, without impeachment of waste, which was not in her power to do.

Answer: The children will be in, not by virtue of her conveyance, but the will, and so will over-reach her estate without impeachment of waste; and consequently that clause in the conveyance, *without impeachment of waste*, will have no operation; for the children may notwithstanding bring an action of waste against her.

* P. 74.

* Hilary Term

10 Annæ. B. R.

Queen and Sutton.

12 Mod. 557.
Information
in nature of a
quo warranto.

THIS was an information in nature of a *quo warranto* against *Sutton*, for usurping the office of a common burgess of the town of the *Devises* in *Wiltshire*; and upon a trial at bar upon this issue, whether *Sutton* was chosen a capital burgess, by mayor, recorder and capital burgesses, the following points arose.

The

Hilary Term 10 Ann.

The recorder had made a deputy recorder, by writing under his hand and seal, and afterwards had revoked this deputation by another writing, a copy of which was offered in evidence of the revocation. But this held not good evidence, because it did not appear but they might have produced the original. Evidence.

Deputation of an office, is in its own nature grantable by parol; and therefore though it should happen to be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol.

By the charter that incorporates this town, the mayor, recorder, and in his absence, deputy-recorder, and capital burgesses, *vel major pars eorundem*, are impowered * to choose capital burgesses: now the question was, whether upon *these* words of the charter, acts done by the mayor and majority of the burgesses, without the presence of the recorder, or his deputy, were good? and the court seemed to incline that they were good, because the word *eorundem* refers not only to the capital burgesses, but mayor, recorder and capital burgesses; and yet the reason why the presence of the mayor is necessary to corporate acts, is not because he is particularly named, but because he is the head of the corporation; and if this were not so, the addition of these words in charters *quorum recorder unus*, would be useless and unnecessary. Construction of charters. P. 75.

Another question was, Whether supposing it not necessary by the charter, that the recorder should be present, yet the *issue* did not oblige them to prove him present at the election? To this it was said by the counsel, that *concesso* the charter did not require the presence of the recorder, the question was no more than this, whether they should be obliged to prove an immaterial part of the issue. It was said farther, that by a parity of reason, it might be expected, that they should prove the presence of every one of the common burgesses: that by the issue no more was meant, than that the election was made by those that had a power to do it; that *ubi major pars, ibi tota*, viz. the authority of the whole. And of this opinion was the court.

Another question started was, whether in a corporation, that was by charter to consist of mayor, recorder, common burgesses, &c. the same person might not be both mayor and deputy-recorder?

Another point was moved upon the words of the charter, which appoints the swearing of a common burgess to be done before the mayor, recorder, common burgesses, or the majority of them, *tunc ibi presentium*; * whether or no, a majority of the whole body was by these words necessary to be present at the swearing, or whether a majority of those that were present was only requisite, though they should not be the majority of the whole? P. 76.

Hilary Term 10 Ann.

It was said, that upon the reason of the thing, it was not necessary that the swearing in should be done with the same solemnity as the choosing, in; for the choice is a voluntary deliberate act; the swearing in, on the contrary, is what a person once chosen may challenge as his right, and may by *mandamus* compel them to do. And if this construction did not prevail, the words in this clause of the charter concerning the swearing, *tunc ibi presentium*, which are not in the clause concerning the election, would signify nothing.

As for the objection, that it seems absurd to say a man must be sworn before a majority of those that are present, since if they are present he must unavoidably be sworn before them *all*; the answer is, that this clause is to be understood of being sworn in by the *consent* of a majority of those that were present.

Another question was, whether by a charter that requires acts to be done by a majority of the corporation, a person might not be removed by a majority of that body, excluding the persons that are to be removed, and cannot vote in their own cause? But the whole court were of opinion, that a removal being an act of an odious nature, all clauses concerning it must receive a strict interpretation; and that therefore the word *majority* should be understood of a majority of the whole corporation.

Another question raised, was, whether not summoning to a meeting members *de facto* disfranchised, though afterwards upon re-examination it should appear they were still lawful members, should vacate acts done * in those meetings? Court inclined to think it would not vacate them.

* P. 77.

Some of these points were directed to be found specially.

Affievedo and Cambridge. B. R.

Ship insured,
and taken by
the enemy.
What taking
such a one as
to make the
insurer liable.

See 2. Burr.
503.

UPON a special verdict the case in substance appeared to be this: *Affievedo* had insured so much money upon a ship called the *Ruth*, for such a voyage, in which ship *Affievedo* is found by the verdict not to be at all concerned, in point of interest. It happened that this ship was taken by the enemy, and kept in their possession for nine days, and then, before it was carried *infra presidia*, viz. a place of safety, it was retaken by an *English* man of war: And whether or no this was such a taking as should enable the plaintiff to recover the sum insured against *Cambridge*, was the question.

It was argued by Dr. *Floyer* for the plaintiff, and Dr. *Henchman* for the defendant.

The

Hilary Term 10 Ann.

The substance of the argument for the plaintiff was, that this was Argument pro quer. rather to be esteemed a wager than an insurance; *a spei emptio & venditio*, and not *a versio periculi*, which in the books of the civil Definition of an insurance by civil law. law, is looked upon as a proper definition of an insurance; that therefore whatever acts of parliament are made about insurances, must be understood of proper insurances, and not insurances of the goods of strangers. That whether or no this is such a taking, as will devert the property out of the owners, is a question properly between them and the retakers. But the question between *Assiveedo* and *Cambridge*, is only whether the ship be taken.

* This case was compared to a man laying a wager, that he * P. 78. should not be robbed in going to such a place; he is robbed, but taking some along with him, pursues the robber, and recovers what he lost; here, though the money is recovered, yet the wager is lost.

So if the wager had been, that such persons should not be married together; they are married, and afterwards divorced, *præcontractus causa*, yet the wager is lost.

It was said further, that without this exposition, *Cambridge* would have two chances, *viz.* that it is not taken, or that it is retaken; but *Assiveedo* would have but one, *viz.* the taking.

Grotius in his treatise *de jure belli & pacis*, lib. 3. cap. 6. sect. 3. Grotius. lays this down as a rule, *placuit gentibus, ut is cepisse rem intelligatur, qui ita detinet, ut recuperandi spem probabilem alter amiserit.* Now in our case the ship was for nine days together in the possession of the enemy.

By the laws of *Spain* and *France*, a continuance in the possession of the enemy for twenty-four hours, is an alteration of the property; and *Albericus Gentilis* tells us that a pernoctation with the enemy, Albericus Gentilis. would by our old *English* law alter the property. And *Grotius* immediately after the place before mentioned, says, that *recentiori jure gentium inter Europæos populos introductum videmus, ut talia capta cenceantur ubi per horas viginti quatuor in potestate hostium fuerint.*

For the defendant it was argued, that surely the law would not Argument pro defendant. put an insurer *non bona fide*, or a wagerer, in a better condition than one that insured *bona fide*, and say that any taking shall enable a wagerer to recover; but that no taking, but such as alters the property, shall enable a real *bona fide* insurer to recover.

* This question in the court of Admiralty would not have born * P. 79. a dispute; for the law is clear, that not length of time, but the bringing *infra præsidia*, into a place of safety, is that which deverts the property. And for that the case of — and *Sands* in the late war was cited; where the ship was taken by *Dubart* in the year 1691. off of *Yarmouth*, carried to *Northbergen*, then sold to *A.* afterwards sold to *B.* *B.* sends her to the *West-Indies*, afterwards to *France*, and in the year 1695. to *England*; where she being retaken, it was

Hilary Term 10 Ann.

resolved that the property was not altered. The words of the judgment in this, and the like cases, are very remarkable: *in presenti pertinere*, is part of the sentence; so that the sentence does not give a new right, but confirms an old one.

Jus postliminium. In the civil law alteration of property is a thing of an odious nature; and therefore the law even by a fiction prevents it, as in the *jus postliminium*; where in order to preserve property in the person returning *jure postliminii*, the law esteems him never to have been a captive, that so *manente cive maneat sua bona*.

Lud. Molin. Lud. Molin. *de justitia, in disputatione* 118. *Prioribus dominis restituenda quæ capta fuerint ab militibus, quibus numerantur stipendia. Bello res per vim usurpantur, quando ad locum tutum, &c.*

Petrinus Bellus. Petrinus Bellus, *part* 3. *Nº* 11. *de postliminii jure reversis. Insuper sciendum, hostibus capta non statim hostium fieri. Milites dicunt, that things so long in the possession of the enemy eorum fieri: jura hoc non dicunt, cum fieri potest that the property may be altered by the possession of a shorter time, & forsan not altered diuturniori possessione.*

Consulat. del mare. *Consulat. del mare, cap. 287.* a book of great authority, lays down the security of the place into which *deducuntur capta*, as that which causes the alteration of property; otherwise, after a proper reward to the retakers, *prioribus, &c.*

*** P. 80.** * *Albericus Gentilis*, in the place quoted by the advocate for the plaintiff, has for his title these words: *Rem non fieri hostis ante deductionem infra præsidia*: and his determination is pursuant to his title, and expressly against what the doctor quoted.

Grotius, lib. 3. cap. 9. sect. 16. Eæ vero res, quæ infra præsidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia dominum nondum mutarunt ex gentium jure.

As for the quotation out of *Grotius, recentiori jure, &c.* *Grotius* builds there upon a mistaken foundation; for he quotes *Albericus Gentilis, lib. 3.* and there is no third book. Indeed in *cap. 3. lib. 1.* there is something like it; but *Grotius* quoted there part of an argument without considering the conclusion, which is directly against his quotation, *perductionem omnino desiderant omnia* says the book.

The court seemed to be of opinion for the defendant. They thought that the plaintiff's being found by the verdict to have no interest in the ship which he insured, should make no difference.

1st, Because they never would be more favourable to an insurer *non bona fide*, or wagerer, than to one that insured *bona fide*.

2^{dly}, Because to make a different interpretation of this deed from what is commonly put upon policies of insurance, would be to run counter to the designs of the parties, who have made use of the very same words that are used in such policies; nay who have expressly provided for this very case, by these words, *interest or no interest*; which words signify nothing at all, unless the same loss in-
titles

Hilary Term 10 Ann.

titles to a recovery where the insurer has no interest, and where he has; and that the property is not altered by the *taking*, they held to be very plain.

To be argued next term by common lawyers.

* Queen and Doughton. B. R.

* P. 81.

THE case was this, a man settled in a parish removes into an extraparochial place, where he gains a settlement, then removes into another parish, and there becomes chargeable.

The question was, What this last parish can do with him? whether, by virtue of that act of parliament, that enables them to send such a one to the last parish where he was legally settled, they may send him to the parish he lived in before such time as he removed to the extraparochial place? for send him to the extraparochial place they cannot, for want of officers to receive him.

What is to be done with persons settled in them.

Judge Powell took this to be *casus omiffus*, and what ought to be moved in parliament; these extraparochial places being many in number, and of great extent.

Salk. 486.

Whitlock and Squire. B. R.

THIS was an *indebitatus assumpsit* for goods sold and delivered. The defendant pleads in bar, that before the time of bringing the action he made a tender of the money, and that ever since the tender *paratus fuit* to pay the money. It was insisted upon, that the plea in bar was not compleat enough; for he ought to have pleaded, that he has been ready to pay the money, not only ever since his tender, but from the time the goods were delivered, *viz* from the time the money first became due. And the court seemed to think this a material omission; for it may be the money was demanded before the tender, and then there is a good cause of action.

Indebitatus assumpsit.

Pleading.

Salk. 623.

3 Salk. 343.

* Silk and Hill. B. R.

* P. 82.

THE question was, whether in a writ of inquiry, it was not necessary, that there should be fifteen days between the *teste* and the return, as well as in other writs?

Writ of inquiry. Whether, as in other writs, there should be fifteen days between the *teste* and the return.

The court seemed not to think it necessary, even by common law; but if it were necessary by common law, that it was helped by the equity and intention of 13 Car. 2. cap. 2. sect. 6.

They

Hilary Term 10 Ann.

They did not think it necessary by the common law; because the statute of *Articuli super chartas*, viz. 28 Ed. 1. cap. 15. made in affirmation of the common law, requires fifteen days between the *teste* and the return of all summons and attachments, as a reasonable time, in which the party, in whatsoever part of *England* he is, may be brought to court: but now a writ of inquiry is no summons, nor in nature of a summons; for both defendant and jurors are out of court.

Writ of inquiry no summons.

But supposing, that by the common law fifteen days are required, yet they thought it might be within the equity and intention of the statute of *Car. 2.* the words whereof are, that in all actions of debt, and all other personal actions, and actions of ejectment, after an issue joined therein to be tried by a jury, and after any judgment had in any such action, there shall not need to be fifteen days between the *teste* and the return of the writs of *venire facias*, *babeas corpora juratorum*, *disstringas juratores*, *feri facias*, *capias ad satisfaciendum*; and that the want of fifteen days between, &c. in any such writ, shall not be a cause of error.

Stat. 13 Car. 2. cap. 2. sect. 6.

* P. 83. * Now the words *any judgment* suppose more than one sort of judgment; but after a verdict, there are but two sorts, viz. Final and interlocutory judgments. Now after an interlocutory judgment there never goes any writ, but a writ of inquiry: therefore should not this statute extend to a writ of inquiry, the word *any* would be improperly used.

After verdict two sorts of judgments, final and interlocutory.

And then the conclusion of the statute, *Nor shall the want, &c. in any such writ, &c.* are words so general, that they need not be tied up to the writs before mentioned in the statute; but may very well be understood of writs of the same nature, and following such judgments: if indeed the conclusion had been, in any of the writs before recited, the statute could not have born such an interpretation.

But the *C. B.* differing in their practice, in this particular, from *B. R.* according to the reports of the clerks, it was judged proper, for the judges of both courts, to meet and establish one uniform rule of practice.

* Easter

* Easter Term

* P. 84.

II Annæ. B. R.

Anonymous.

IF so be that a poor person be removed from the parish of *A.* to the parish of *B.* by order of two justices, and the parish of *B.* remove him to the parish of *C.* the order of the justices removing him to the parish of *B.* is become final, because *B.* did not appeal to the quarter-sessions.

Order of justices, when final.

Anonymous. B. R.

AN exception was taken to an order of justices made for the maintenance of a bastard child, that it was not set forth in the order, that the bastard child was likely to become chargeable to the parish, which is the very foundation of the jurisdiction of the justices of peace.

Order of justice for the maintenance of a bastard.

Sed non allocatur; for the law presumes that bastard children will become chargeable, because nobody is bound to provide for them, and therefore this need not appear in the order.

Bastard children presumed likely to become chargeable.

* Another objection was, that the order was for the reputed father to pay so much a week for the maintenance of the child, until the child should come to the age of eight years; whereas the order ought to have been conditional, if the child continue so long chargeable.

* P. 85:

Sed non allocatur; for such orders in the very same form have often been allowed; and the words of the order, *towards maintenance of the child*, do imply such a condition.

N. B. In case of bastards, complaint not necessary to the giving justices of the peace jurisdiction, as it is in the case of poor.

Complaint, not necessary in bastards as in poor.

Easter Term 11 Ann.

Mitchell and Reynolds. B. R.

See ante 27.
Post. 130.
Fort. 296.

THAT the bond was void, these cases cited: 2 Hen. 5. 3 Levinz 24. 3 Cro. 208. where if a sheriff takes a bond for his execution fees, it shall be void; but held that a promise would have been good.

Contracts of infants.

* P. 86.

On the other side it was said, That an infant could not, either by a parol contract, or a deed, bind himself, even for necessities, in a sum certain; for should an infant promise to give an unreasonable price for necessities, *that* would not bind him; and therefore it may be said, that the contract of an infant for necessities, *quatenus* a contract, does not bind him any more than his bond would; but only since an infant must live, as well as a man, the law gives a reasonable price to those who furnish him with necessities. 2 Hen. 5. was but the extrajudicial opinion of a single judge; and then it was a total restraint for a particular * time, whereas this is but a restraint in a particular place. And for the case of execution fees, upon the statute of 29 Eliz. cap. 4. it was to prevent oppression; for the sheriff might threaten the persons concerned, that he would not let them have the execution, unless they would enter into such a bond.

The Judges retained the same opinion they had in a former argument upon this case.

And Judge Eyre said, that if the bond was void, the reason must be, because it was *malum in se*; and then several customs which stand upon the same reason, and have been adjudged good, will be overthrown; and he was of opinion, that the jury had no more power in an *assumpsit*, where the promise was certain, to mitigate the damages, than they had in case of a bond; and if so, the reason of the difference between bond and *assumpsit*, that has been so much insisted on, falls to the ground. *Vide postea, Hil. 11 Ann.*

Widdrington and Charleton. B. R.

Appeal for murder.

THIS was an appeal brought by the wife for the murder of her husband; and upon a demurrer, these two points were insisted upon.

1st, That in the writ, the t. in the word *appellat* was turned up; and therefore the writ was insensible, and in the eye of the law no writ at all. 3 Cro. 182, 467. Mich. 1693. Ball and Roe.

2^d Exception was, that there was a discontinuance; for in the exigent the words *de morte sui viri, unde eum appellat* were omitted; and therefore it did not appear that this exigent was sued out in this action.

To

Easter Term 11 Ann.

To the 1st it was answered, that the turning up of the t. being no known abbreviation, should go for nothing.

* To the 2^d point it was said, that this was an exigent sued out * P. 87. between the same parties that the *capias* was; and that there is no variance between the *capias* and the exigent, though there is something more contained in the *capias* than what is in the exigent. And upon prayer of *oyer* of *mesne* process in this action, this exigent was recited, and thereby admitted to be the exigent in this suit.

It was argued further, that this discontinuance, if it was one, was aided by appearance; and that the difference taken, that appearance and pleading-over does aid a discontinuance, but not appearance and demurrer, was not law. 9 Hen. 5. fol. 2. 2 Cro. 284. Roll. Abr. 789. 4 Co. Rep. Basse's case. 1 Ventris 7.

Serjeant *Chefhyre* for the appellant, Mr. *Reeves* for the appellee. Adjournatur.

Rogers and Wood. B. R.

IN this case a release of a recognizance was pleaded to be *ante* ^{Release.} *emanationem* *scire facias*, which is naught; for it might be ^{Pleading.} made before the action brought, and the plea true, and then the release is void. 5 Co. Rep. 70. *Hoe's* case. 1 Inst. 265. *Goldsb.* 166. *Moore* 469.

* Michaelmas Term

* P. 88.

11 Annæ. B. R.

Rush and Seymour. B. R.

STATUTES of amendment extend only to pleadings of re- ^{Amendments} ^{of pleas.} cord; therefore pleadings while in paper are amendable by ^{Salk. 47.} common law. ^{3 Salk. 31.}

Anciently all pleas were *ore tenus* at the bar; and then if any error was spied in them, it was presently amended. Since that custom is changed, the motion to amend, because all in paper, succeeded in the room; and it is a motion that the court cannot refuse: ^{Salk. 520.}

But

Michaelmas Term II Ann.

But they may refuse it, if the party desiring it refuse to pay costs, or the amendment desired should amount to a new plea.

* P. 89.

* *Radeliffe and Roper.* In Chancery.

See post. 230.
See this case
9 Mod. 167,
181.

In this case
three points
resolved; 1st,

If an estate be devised to be sold for payment of debts, surplus to a Roman catholic; that this surplus is in nature of a real interest, and as such void, by act of King William. Resolved 2dly, That the word purchase, in that act, does include devise. Resolved 3dly, That a subsequent devise to A. though A. be incapable of taking, is a revocation of a precedent devise to B.

THIS being a case of consequence, Sir Simon Harcourt, Lord Keeper, was assisted by Sir Thomas Parker, Lord Chief Justice of B. R. Sir Thomas Trevor, Lord Chief Justice of C. B. Powell, Judge of B. R. and Sir John Trevor, Master of the Rolls.

The case in substance was:

For a more
full state of
the case, vide
post.

A Roman catholic devises his land to four trustees, two papists and two protestants, to be sold for payment of debts and legacies; and by a codicil, amongst other legacies, he devises the remainder, whether in lands or personal estate, to two papists and their heirs.

Now, Whether this was a good devise, so as to disinherit the heir at law, being a protestant, notwithstanding the 11th and 12th of Will. 3. chap. 4. made for preventing the growth of popery, was the question.

For the better understanding the force of the argument on each side the question, it will be proper to premise the aforefaid act.

Stat. 11 and
12 Will. 3.
cap. 4. for
preventing
growth of
popery, ar-
gued largely
upon.

By the said act it is provided, ' That from and after the 29th of September 1700. if any person educated in the popish religion, or professing the same, shall not within six months after he or she shall attain the age of eighteen, take the oaths of, &c. and subscribe, &c. every such person shall in respect of him or herself only, and not to or in respect of any of his or her heirs or posterity, be disabled and made incapable to inherit or take by descent, devise or limitation, in * possession, reversion or remainder, any lands, tenements or hereditaments; and that during the life of such person, or until he or she do take the said oaths, and subscribe, &c. the next of his or her kindred, which shall be a protestant, shall have and enjoy the said lands, tenements and hereditaments, without being accountable for the profits by him or her received during such enjoyment thereof, as aforefaid; but in case of any wilful waste committed on, &c. by the person so having or enjoying the same, &c. the party disabled, his or her executors and administrators, shall recover treble damages for the same, &c. And that from and after the 10th of April 1700. every papist, or person making profession of the popish religion, shall be disabled, and is hereby made incapable, to purchase either in his or her

* P. 90.

Michaelmas Term 11 Ann.

own name, or in the name of any other person or persons, to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms or hereditaments; and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th of April, to be made, suffered or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect, to all intents, constructions and purposes whatsoever.

It was argued in favour of the devise, that there was nothing in the act to prevent papists from selling their lands; but the design of the act was rather to oblige them to sell, and turn their real into personal estate: For the continuance of ancient seats in the hands of papists, was esteemed the chief bulwark and support of popery, thither resorting jesuits, &c.

* If a *Roman catholick* may sell, he may certainly give away the money arising from the sale to a catholick. * P. 91.

If now a papist may do this in his life-time, why may he not, as to the reason of the thing, appoint this to be done by trustees after his death?

If it be objected, that though the estate, being by the will appointed to be sold, must be in common law looked upon as personal estate, yet it is land in equity, because it is a known rule in equity, that the residuary legatees may come into the court of Chancery, and pray that they may have the land, upon their paying the debts and legacies, for payment of which the land was to be sold.

It may be answered, that if a person has his liberty to take either land or money, the court will not compel him to take the land; for where then would be his liberty?

Besides, for the court, as this case is, to decree him the land, were to take from him what the law allows him to take and enjoy, and give him *that* which an act of parliament disables him from taking, and consequently would altogether overturn the will of the testator. Neither is this the only case where this rule of equity may happen to fail; for suppose the surplus were devised to an alien, whom the law disables to take land, shall this court decree him the land, *that* which the law will not suffer him to enjoy? Should this be esteemed as a real estate, it would follow that a *Roman catholick* could not charge his lands with portions for younger children of his own perswasion, or payment of his popish creditors; because, by the same rule of equity, if the land were but sufficient for the payment of debts, &c. the creditor might come into a court of equity and pray the same thing.

Michaelmas Term II Ann.

* P. 92. If it be objected, that the testator himself calls it land; for in the codicil, he devises the remainder, whether *in lands, &c.* It may be answered, that this was but the flourish of a lawyer's pen, and that if the will were complied with, there could be no remainder of any real estate.

Thus far it was argued, upon supposition that a *Roman catholick* was, by this act of parliament, disabled from devising real estates to a papist; but that he was not, it was argued to this effect:

That this act of parliament, as to the first clause of it, which respects those under the age of eighteen, did not create an absolute, but a conditional disability only, *viz.* if after the age of eighteen he did not do so and so, &c. and if he did not, it did not even then create a total and absolute disability; but only made *quasi* a sequestration of the profits during life, or non-compliance.

Then comes the second clause, which creates in every papist an absolute disability to purchase lands, &c.

Purchase.
Legal import
of it.

It is true, that speaking as a common lawyer, the word *purchase* stands opposed to descent, so that whatever estate a man does not come to by descent, he does by purchase, and then purchase necessarily includes devise. But it is not always taken in such a comprehensive sense; and even in this court, the word *purchase* is frequently used by way of contradistinction to voluntary settlements. And that it is here to be understood in the vulgar and more common acceptation of the word, appears from the former clause, respecting infants; where the act makes use of the words *devise, limitation* and *descent*. Now had they understood the word *purchase* in the legal acceptation, that word alone might have supplied the place both of limitation and devise.

* P. 93. Besides, the words in the act immediately subsequent to purchase, *viz.* in his name, or to his use, &c. seems to restrain and confine the word *purchase* to some act * to be done by the party, to whom the estate moves, and not from whom.

And then for the third and last clause, *viz.* That all and singular estates, terms, and other interests, or profits whatsoever out of lands, from and after the 10th of *April*, to be made, suffered or done, &c.

It was argued, that this clause should not make a devisee a purchaser; because it was not an independent clause, but explanatory of the foregoing; the word *such* plainly coupling it to *that*, to which it was only the addition of a penalty. For the preceding clause incapacitating a papist to purchase, it might be asked, but what if he should? then comes this clause, and answers the question, saying it should be void.

To understand this clause in another manner, were to set one part of the act at variance with the other, For whereas the first clause creates but a conditional disability of taking by devise, *viz.*

Michaelmas Term 11 Ann.

if they do not so and so, after the age of eighteen, &c. this clause thus understood makes an absolute one.

All this was strengthened by observing, that penal laws must receive the most mild and favourable interpretation.

On the side of the protestant heir at law, it was insisted, that this was a real devise, or a devise of land.

Argument for the protestant heir at law.

For as to the objection, that this court could not, in this case, decree the land to the residuary legatee; because that would be for this court to decree him what he is by this act unqualified for enjoying:

It was answered, That before this act of parliament it would have been land in equity; and surely, it cannot be pretended, that there is any thing in the act to alter it. It would be very strange, if this court should, after an act of parliament made for the preventing the growth of popery, make one rule for a protestant, and another in favour of a papist; and look upon the * same devise as * P. 94. real, if made to a protestant; but as personal, if to a papist.

As for the case put of remainder to an alien; it was answered, that an alien may take, but not for his own advantage, but that of the crown, who, in that case, would have the land.

Land would even at common law pass by the words profits out of land: but here the testator himself in his codicil calls it land, which makes it a stronger case; and then the word remainder, which imports a fee, according to *Lutwyle* 762, and makes it go to the heirs, not executors, shews that it has the nature of a real estate, and was esteemed of as such by the testator.

Profits out of land will at law pass the land itself.

As for the objection, that this would fall hard upon younger children and creditors of papists; it was answered, that the design of the act was to lay difficulties upon Roman catholicks. And besides, this case differs from *that*, because it was here the case of a residuary legatee: and whether as to creditors, and younger children, it might not be considered as personal estate, though real to the residuary legatee; and whether because the residuary legatees might pray to have the land, the creditors might do so too, the counsel of the same side differed in opinion.

And because the counsel for the protestant trustees had argued, that if the devise was void as to the popish trustees, the whole should go to them: it was urged by the counsel for the protestant heir at law, that the codicil was a revocation of the will. And to this purpose, 1 *Rol. Abr.* 614. was cited, where land is devised to one, and after, the same land is devised to the poor of the parish, who are incapable of taking; and it was held, notwithstanding, the last devise was a revocation of the former.

Latter devise though void, yet a revocation of a former if inconsistent.

As to the act of parliament, that a papist was disabled by it from taking land by devise, it was argued * from the design of the act * P. 95. in

Michaelmas Term 11 Ann.

in general ; which would be wholly vain, and by no means answer the end it was designed for, unless this interpretation was put upon it. Protestant heirs of popish ancestors will be always disinherited ; and it will be very easy to conceal a gift under a devise ; one need only suppose a papist makes his will, and enters into a bond not to revoke it.

It seems strange to imagine the legislators intended to leave Roman catholicks free to take land by devise, a way that costs them nothing ; and tie them up from taking land by purchase, a way, in which they are to pay a valuable consideration for it.

It had been a more reasonable intention, to have incapacitated the papists from taking land this way of all others. For making a will is a serious act, done often *in extremis*, at a time when men are more than ordinarily solicitous, so to dispose of their possessions, as they think, and will be told, at least, by their priest, is most for the good of their souls, *viz.* to those of their own communion.

Unless this interpretation prevails, grown papists will be in a better condition than those under age, which surely was never the intention of the law-makers.

As for its being a penal statute ; the question is not about extending penalties, but whether the act shall not be in a manner useless.

1 Rich. 2.
Escape by
equity.
Petty treason
by equity.

Besides, penal laws made for the preventing publick mischiefs, have been, and may be extended. As the statute of 1 Rich. 2. that gives an action of escape against the warden of the Fleet only, extended by equity, to all gaolers whatever. Statute of petty-treason for a servant to kill his master, extended to a mistress.

9 Mod. 177.

The word *purchase* in a legal sense includes devise ; and legislators may well be supposed to be acquainted with the legal import of words.

* P. 96.
Third clause
of the act an
independent
clause, and
not explanatory
of the
former.

* But the *third clause* was *that* relied upon, which (it was said) was not explanatory, but an independent clause, referring to those above the age of eighteen. For as for the word *such*, that did not make it explanatory of the preceding clause, but only referred it to the persons spoken of before, *viz.* Persons professing the popish religion. And besides, it has a new commencement, a plain mark of its being a new independent clause. But supposing it an explanatory one, certainly the precedent clause is to be governed by the explanatory one, and not *vice versa*.

And, without doubt, the words in the third clause do include devise ; for the words *profits out of lands*, may be construed of profits arising from sale, as well as continuing profits. Certainly a devise to a papist will fall under these words, *estates, terms, interests, &c.* to be made, done or suffered, to the use, benefit and relief of papists.

Note,

Michaelmas Term 11 Ann.

Note, it was said, that a purchase for a valuable consideration could not be included under the word *relief*; because the worth being paid, it could not be deemed any relief; *contra* of a will.
Vide post. Pasch. 13 Ann. in house of lords.

Lord Lansdown's case. B. R.

THIS was an ejectment brought by three coheirs against the Lord *Lansdown*. And upon a trial at bar, two points arose, which at length came to be found specially, as appears from the following notes of what passed at the trial at bar.

The Earl of *Bath*, the common ancestor, made his will dated 24th of *October* 1684. under which will the Lord *Lansdown* claims: This will afterwards in 1696. stood revoked, by act in law, as to all the real estate devised by it, but not the personal.

* Some years after he told Mr. *Nicholls*, then in the same coach * P. 97.
with him, that he designed to republish his will: The day after, in the presence of several people, he brings with him his will in one hand, and two codicils of the same import in the other, and says, *This* is my will, by which I have settled my estate; and *this* I design as a codicil to my will, to be taken as part and parcel thereof. Then the codicils were duly executed, according to the statute of frauds and perjuries; and the will and one codicil were sealed up in one paper, with the Earl of *Bath*'s seal, and the other codicil in another paper, with the same seal; and these papers were, after his death, produced by those with whom they were deposited.

Neither will nor codicil were read at the time of republication.

In the codicil he takes notice of his will in the following manner:

Whereas I made my will in 1684. which I do not intend wholly to revoke; but in respect of many alterations since happening, &c.

Whether this amounted to a republication of his will, the will not being sealed and subscribed, as the statute for preventing frauds, &c. was the question. Doctrine of the republication of wills.

This point, before it was found specially, was spoken to, by the counsel for the plaintiff, to this purpose.

That when the will was revoked, it became a meer scroll; a paper, indeed, in which there was writing, but of no force, and no more capable of becoming a will, than any other paper whatever.

In 1 *Roll. Abr.* 618. it was held, even before the statute of *frauds and perjuries*, that the inserting of a new legacy, or making another executor, did not amount to a new publication.

* It appears from the case of Sir *Litton Strode* and Lady *Falkland*, that the making a codicil, *quatenus* a codicil, is no new publication; * P. 98. 2 Vern. 625, 722.

Michaelmas Term II Ann.

lication; for in that case, a man by his will devises all his lands; afterwards he purchases other lands, and after that he makes a new codicil to his will, executed according to the statute of *frauds and perjuries*; and whether this was a new publication of his will, so as to take in the lands after-purchased, was the question; and resolved by Lord *Cooper*, Chief Justice *Trevor*, and Judge *Tracy*, that it was not; for since the statute of *frauds*, the same forms are necessary to the republishing of a will, as to the first making.

Same forms necessary to republishing as making a will.

In *Trevanion's* case, a man holds up a paper, and says, this is my will; where it was held, that these words did not make it his will, because it was not read; and this before the statute of *frauds*.

Case of Cotton and Cotton, 2 Vern. 209. contra.

That no parol declaration referring to a paper in writing, would make a republication, even before the statute of *frauds*, is plain from the case of *Bret and Rigden*, in *Plowden's Commentaries*. And here is nothing pretended in writing, that imports a republication; for as for the words in the codicil, no one that reads them, can think they do: and for the parol declaration, it was literally true; for it remained a will, as to his personal estate.

Plowd. 342.

Lapsed legacy. 2 Vern. 722.

Second point was, That supposing the will republished, yet it could convey no title to the defendant, because he claims as issue male to the devisee in tail, *Bernard Granville*, who died, living the testator; and therefore it was a lapsed legacy.

And of this opinion was the court.

* P. 99.

But the counsel insisting that this was a devise in tail, and therein different from the case of *Bret and Rigden* in *Plowden*; and that in this will the testator declares, that he so devised it for the preservation of his name and family; and that the republication was after the testator * knew of the death of *Bernard Granville*; and therefore could not intend that *Bernard*, who was dead, should take; and desiring, upon their reputation, a special verdict, it was granted.

Cases cited in respect to this second point, were *Fuller and Fuller*, *Cro. Eliz.* 422. which case is also taken notice of in *Moore's Rep. Steed and Burier*, in which case, resolved by both courts, That there is no difference between a devise in fee, and in tail, as to this purpose.

2 Vern. 98, 337, 339. Evidence. Parol declarations not to be allowed as evidence to explain wills, unless in affirmation of the common law.

The counsel for Lord *Lansdown* offered in evidence parol declarations of the testator, that it was his intention the issue male should take by the will: but this was opposed *per* counsel for the plaintiffs, and refused by the court.

Cases quoted as to this purpose, 2 *Cro. Rep. Molineux* and *Molineux*; where held, that if a will refers to a thing in writing, that it is altogether as good as if the writing referred to were inserted in the will *verbatim*: but *contra*, where the will refers to a parol declaration;

Michaelmas Term II Ann.

claration; for no regard to be given to it, though referred to by the will. 2 Leon. 70. 5 Co. Rep. *Cheyney's case*. *Rigden's case*, *Plowd. Com.* case of *Berty and Falkland*, before Lord *Somers*. The case of *Littlebury and Buckley*, which was to this purpose: a rule had obtained in equity, that where there are specifick legacies, and no residuary legatee, that there the *residuum* should be divided according to the statute of distributions, contrary to the common law, which gives it to the executor: now here the court did receive parol evidence, to prove it to have been the intention of the testator, that the executor should have the *residuum*; and that it should not be divided. But the reason why the court did this, is expressly assigned to be, because it was in affirmance of the common law; whereas here the evidence is offered in contradiction to the common law, viz. to enable * the issue to take by purchase, who by rules of common law was to take by limitation. This point was likewise fully settled in the case of *Litton and Falkland*, that went through the house of Lords. 2 Vern. 648, 737. 9 Mod. 9. * P. 100. 2 Vern. 624, 625.

It was observed, that most of these cases, being before the statute of *frauds and perjuries*, stood only upon the statute for wills in writing, and must receive an additional force from the statute of *frauds*.

Indeed if a man devises an estate to his son *John*, and there are two sons of that name, or if a man devises the manor of *Dale*, and there are two of that name; parol evidence shall be allowed to explain which of the two the testator meant. In wills parol evidence good by way of averment, where two things, or two persons are of the same name. 2 Vern. 593.

Reason of the law in this point clear and strong; for if parol evidence be once allowed to explain a will, and give it another sense than what can be collected from the words of the will standing alone, what purchaser under a will can be safe? or what lawyer can give his opinion upon a point that depends upon a will?

* Queen and Borough of Aldborough. B. R.

THIS was a *mandamus* to the mayor and burgesses of *Aldborough*, commanding them to restore one *Sparhawk* to the office of capital burghers of that borough. Mandamus to restore a capital burghers.

To this they return, for cause of not obeying the writ, that he had not taken the sacrament within a year before the election, according to the statute of 13 Car. 2.

To this return it was objected by Sir *James Mountagu*, that the act of 13 Car. 2. as to taking the sacrament, was only directory, as to the electors, what sort of man they should choose, and did not make a nullity of the office. Stat. 13 Car. 2. called Qualification act.

Michaelmas Term II Ann.

* P. 101. * And to maintain this point, the case of *The King and Larwood*,
 Vide Salk. *Hill. 6 W. 3.* was quoted, which was an information against *Lar-*
 1167. *wood*, for not taking upon him the office of sheriff of the city of
Norwich, of which office he was capable; he pleads to the infor-
 mation, that he had not taken the sacrament within a year, &c.
 and so was incapable; demurrer, and judgment on the side of the
 information. This a case in point; for whether the not receiving
 the sacrament created an incapacity, was the foundation of the de-
 murrer.

See page 64. *Court*: This interpretation of the act was never offered to any
 Person put in- court before the case of *Whiteborn*; and should it prevail the act
 to an office would signify very little.
 not having
 received sa-
 crament, in
 point of law
 no officer.

As to the authority of the case of *The King and Larwood*, it
 amounts to no more than this, That a man shall not defend one
 crime by another, viz. his not taking upon him the office, by his
 not receiving the sacrament.

Stat. 13 Car. 2. A second objection to this return was, that it did not shew that
 extends to all this corporation was in being, at the time when this act was made:
 corporations *sed non allocatur*: for the act extends to all corporations created
 created before and after that act. 2 *Ventris* 243.

A third objection to this return was, that it did not appear that
 the person was summoned to say what he could for himself.

Returns to . To this it was answered, that this return amounted to a special
 mandamus's. *non electus*, which must be as good as a general one, because it did
 imply it. And to prove a general *non electus* would have been a
 good return, these authorities were quoted: *Dunch and the City of*
 Vide Salk. *Norwich*, Easter term 1706. 1 *Siderfin* 209. reported likewise by
 436. 1 *Keble* 716. where the return was *non debito modo electus*; held there
 * P. 102. indeed, that the *debito modo* was * wrong, because it made the party
 a judge of the legality of the choice; but without that the return
 had been good. 1 *Showers's Rep. Farrington's case*, the return was
nunquam fuit electus & perfectus; leave was given to amend the
 return, by striking the *perfectus* out.

Parker Chief Justice.

Whether cor- I think it very proper a corporation should hear a man before they
 porations can expel mem- expel him. No inconvenience in holding corporations to this, for
 bers without it can only keep those in, that are qualified to stay in: and if cor-
 first hearing porations will unjustly, after hearing, expel men, it aggravates the
 them. fault, because done against knowledge. It is true the party has an
 action to be restored; but then, in the mean time, he is wrong-
 fully kept out.

Powell:

Michaelmas Term II Ann.

Powell: Very reasonable that corporations shall do this; but whether by law we can oblige them to it, is the question. If a general *non electus* had been a good return, why not that which amounts to a special *non electus*? surely the adding the reason does not make the return worse.

No opinion given in this point.

Parker and Lilly. B. R.

A Man assigns his bond to B. B. sues this bond in the name of Chancery. the assignor, has judgment; a writ of error brought, and judgment affirmed; after execution taken out, but before it was returned, the assignor gives a warrant of attorney to confess satisfaction upon record, which is accordingly done, and upon this a *superfedeas* taken out to stop the execution; and now the court was moved to set aside the *superfedeas*.
If after assignment of a bond the assignor gives a warrant of attorney to acknowledge satisfaction upon record, this relievable only in Chancery.

* 1st, Because after assignment the court will not suffer the assignor to give a warrant of attorney to acknowledge satisfaction; and for this 1 *Keble* 803. was quoted. * P. 103.

But, as to this, it was said, that the assignment was matter of equity, and was more proper for Chancery than for this court; and a late case was quoted in the Common Pleas, where a bond was taken in trust for another, and the obligee dying while the suit upon this bond pended, it was held that *cestuy que trust* could not go on in the action, because this court could not take notice of the trust, or of any other plaintiff than who appeared to be so upon record.
Courts at law can take no notice of trusts, but courts of equity only.

And of this opinion was the court.

But then 2dly, in favour of the motion, it was further insisted upon, that after execution was gone out, it was not regular to grant a *superfedeas* without a judge's hand.
Practice. Whether after execution a *superfedeas* can issue without a judge's hand.

Court took time to inquire into the practice.

Ongly and Peed. B. R.

THIS was a writ of error out of the Common Pleas; and the case was no more than this; a man devises his land to A. and his brothers *successive*; but not to be entered upon or enjoyed by any of them until after marriage. A. was by the verdict found to be the eldest brother: and, whether this will was void, by reason of the uncertainty, *who should take*, was the question?
See Com. 197. A devise to A. and his two brothers successive, not void for uncertainty; for the law directs who shall take first.

VOL. X.

T

The

Michaelmas Term 11 Ann.

* P. 104. The court were all of opinion, that the will was a good will, and certain enough; for being in the case of *brothers*, the common law was a guide to the exposition of the word *successive*, viz. that the eldest should, after his * marriage, enjoy it *first* for his life, *then* the second, and *then* the third; especially, when *he* who was named in the will, is by the verdict found to be the eldest brother: had the devise been to *A. B. and C.* to take *successive*, it would have been void for the uncertainty.

Cases quoted in the argument were *Co. Litt.* 377. *Hobart* 313. *Raym.* 82, 83. *Styles* 434, 435. *Moore* 636.

Sawkill and Warman. B. R.

Infimul computasset.

Pleading. When the plea should be *actio non accrevit infra sex annos*, instead of *non assumpsit*.

THIS was an *infimul computasset*: the count, upon which the question arose, was, that upon an account taken the 9th of *Jan.* the defendant appearing to be indebted to the plaintiff in the sum of 150*l.* promised payment upon the 30th of *Jan.* Defendant pleads *non assumpsit infra sex annos*. To this it was demurred, because the six years are to be computed from the time of the performance, and not of the promise; and therefore this plea might be true, and yet the plaintiff not barred by statute of limitations; and therefore the plea should have been *actio non accrevit infra sex annos*. And of that opinion was the court.

In *Hillary* term following there was another case, parallel in *omnibus*.

Cases quoted were *Buckler and Moor*, *Mod. Rep. Cro. Car.* 139.

Inhabitants of Ware. B. R.

See Tawny's case, Salk.

531.

Parish taxes.

A rate cannot be made to reimburse an overseer of a former year.

IN *Tawny's* case, which does not materially differ from this, the question was, whether a rate might be made to reimburse an overseer of a former year; and resolved it could not, and upon this ground, that the present inhabitants are by law bound only to the maintenance of the present poor; for at that rate no body that comes into a parish, can tell what he is to trust to.

* P. 105.

* Company of Stationers *versus* — B. R.

Issue directed out of Chancery.

THIS was a point of law, directed out of Chancery, for the opinion of the judges of *B. R.*

The

Michaelmas Term 11 Ann.

The question was, Whether the grant of the crown, to the company of *Stationers*, to have the sole printing of almanacks, provided they were licensed by the archbishop of *Canterbury* and Bishop of *London*, were a good grant; or void, because against the liberty of the subjects?

Question, Whether patent to company of Stationers for sole printing almanacks, good, or not?

Against the patent it was argued, that printing was an handicraft trade, and therefore no more to be restrained than other trades; for to say, that the crown has a power over all trades, that may prove *malum per accidens*, would carry the prerogative of the crown, nobody knows whither.

Argument against legality of the patent.

Where the crown has no right of copy, it cannot appropriate the printing to particular persons: but where the crown has a right to the copy, there it may; as in the case of the translation of the *English* bible, and the year-books. 2 *Chan. Rep.* 76. gives the King an interest in the statute book; and the same may be said of the book of common prayer.

In 1 *Mod. Rep.* *Seymour's* case, it is indeed said, that an almanack is but a copy of the calendar, out of the book of common prayer.

1 *Mod.* 256.

In answer to this, *res altius repetenda*.

Before the reformation, the book of common prayer was subject to the alteration of the ordinary; and there were almost as many common prayer books as dioceses, as appears from *Linwood* 103, *Oxford* edition. Every bishop had the appointing of the feasts that were to be observed in his own church and diocese. In the year-book of 9 *Hen. 7.* 14. b. it is said, that the * calendar is of no authority. So that before the reformation, the calendar could be no creature of state: and as for the almanack's being said to be a copy of the calendar, no reason for it; indeed both are registers of time, the one for prophane, and the other for sacred uses.

An almanack no part of the calendar of the book of common prayer.

* P. 106.

Then it was argued, that the patent was void, because introductory of a monopoly. 2 *Inst.* 47. where monopolies said to be contrary to *Magna Charta*. *Register* 105, 107. about monopolies. *Moore* 674. liberty of the subject precarious before *Magna Charta*. That statute does not annul monopolies then in being; but prevented any more. 3 *Mod.* 76, *Darcy* and *Allen*. A grant to make all playing cards, judged to be a monopoly.

Monopolies.

For the patent it was argued, that the crown had a peculiar right and interest in the book of common prayer, and consequently in the calendar, which is a part of it; and the making some additions to it, shall not devert the crown of their interest in it.

Argument in favour of the patent.

Since the art of printing was found out, it has been more under the care of the crown than any other art whatsoever. 1st, Because it was an art introduced by the care of the crown; so said in *Carter's* case,

case,

Michaelmas Term 11 Ann.

case, which gives the crown a property in the trade. *2dly*, Because of the greatness of the inconvenience, that may redound to the publick, from the mismanagement of the press. *Carter Rep.* 89. the controversy was about the printing *Rolle's Abridgment*; decreed in Chancery, in favour of the patentees, and this decree confirmed in the house of Lords. *Micb.* 24 *Car.* 2. the question was about the patent for sole printing of all law books; judgment against the patentee in *B. R.* for the uncertainty of what should be esteemed a law book: but this judgment was reversed in the house of Lords. *1 Mod.* 256. *Seymour's* case, full in point, the same objections made as here.

* *P.* 107. In 34 *Car.* 2. *Company* * of Stationers v. *Skinner*; patent allowed for Law books. *Primers, Psalters, Psalms and Almanacks.* 34 *Car.* 2. in Chancery, Patent for sole printing *Company of Stationers v. John Gale*; no decree, indeed for printing law-books, *Psalms, Psalters and Almanacks*; but the reason was, because the judged good person controverting the patent submitted without. 25 *Jan.* 34 *Car.* 2. *Company v. Wright*, patent for printing *Psalms* allowed. *Micb.* 33 *Car.* 2. *Company v. Lee*, another patent for *Psalms.* *Trin.* 12 *W.* 3. *Company v. —* patent for *Almanacks.* In *stat.* 9 *Anna.*, this very patent now in question, taken notice of. 3 *Cro.* 227. *Almanacks* of authority in trials.

Court: Patent for sole printing of law books, not now to be shaken, having had the sanction of the house of Lords: monopolies odious; this case therefore, to be distinguished, by deriving to the crown some special interest in *Almanacks.*

No opinion given: To be spoken to again.

Queen versus Mayor and Burgeses of Pomfret. B. R.

* *Mandamus* to restore a bur-
gels.
THIS was a *mandamus*, directed to the mayor and burgeses of *Pomfret*, to restore *William Lee* to the office of burgeses. To this they return, that he was such a day *electus & perfectus*; then shew for cause of removing him, his non-attendance at the sessions; then they come and say, that he had not taken the sacrament within a year before his election, and that therefore his election was null and void.

Return, if it contains matter repugnant and contradictory, naught.
The court was of opinion, that this return was bad, by reason of the repugnant and contradictory matter contained in it.

* For 1st, They return, that he was such a day *electus & perfectus*; then shew for cause of removing him, his not attending at the sessions, according to his duty; and then shew matter, that proves him never to have been elected; and consequently, that it was so far from being his duty to attend, that it would have been an act of presumption for him to have done it: and though several causes may be returned, yet they must not contradict one another; according to the case of *Dunch and the City of Norwich*, *Pasch.* 5 *Anna.*

Salk. 436.

Michaelmas Term II Ann.

2dly, They held, that non-attendance at the sessions was not a good cause of removal: for though they agreed the difference taken 9 Co. Rep. 99. between publick offices, that concern the administration of justice, and private offices, viz. That *non user* in the one, is no forfeiture without a request, and some special loss occasioned thereby, as it is in the other; and that the office of burghes is a public office, &c. yet this case was different; for the absence of a single alderman does not hinder the holding of courts, or the validity of the acts of that court; so that here absence does not amount to a *non user* of the office.

Non user of publick offices a forfeiture; contra in private ones, without request or special loss by reason of such non user.

The court was likewise of opinion, that returns to *mandamus*'s were to be kept to the same strictness, since the *mandamus* act, *nono Annæ*, as before.

Preremptory *mandamus* granted.

Stennil *versus* Brown. At Nisi prius, B. R. Guildhall, London.

A Condemnation of a ship as prize, in the Admiralty court of France, was attempted to be proved by a copy of the condemnation, subscribed by the officer of the court: but Chief Justice Parker, who tried the cause, would admit of no evidence, but an exemplification * of the condemnation under the seal of the court. * P. 109.

Evidence.

A copy of a rule of court, signed by the officer of the court, is no evidence in any other court, unless the judge of the court set his hand to it himself: but at *Nisi prius*, hand of the officer enough, because it is the same court.

Nickson and Brohan. At Nisi prius, B. R. Guildhall, London.

THE case was this; A *master* sends his servant, that was used to transact affairs of that nature for him, on *Saturday* morning, with a note drawn upon Sir *Stephen Evans*, with orders to get from Sir *Stephen* either bank bills, or money, and turn them into Exchequer notes: but the servant having other business of his master's upon his hands, to save himself the time and trouble of going to Sir *Stephen*, goes to *B.* and prevails with him to give him a bank bill for note upon Sir *Stephen*; and then in pursuance of his master's orders, invested it in Exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir *Stephen*.

Master and servant. Of the credit a servant derives from his master, in being used to transact affairs for him.

Sir *Stephen Evans* failing upon the *Monday* following, upon whom this loss should light, *B.* or the master, was the question.

VOL. X

U

Chief

Michaelmas Term II Ann.

Salk. 442. Chief Justice *Parker*, who tried the cause, was first of opinion, that it should fall upon *B.* because the servant acted directly contrary to his master's orders, and *B.* by furnishing the servant with a bank bill, did the master no service at all; for if he had not done it, the servant must in obedience to his master's orders have gone and received *himself* the money from Sir *Stephen*; and cited the case of * P. 110. *Ward and Evans*, where resolved, * that if a servant sent to receive money, takes a bill in lieu of it, the master is not bound by the act of the servant, unless the bill is answered.

But one of the jury informing him that he took the practice to be otherwise, (for that whether a servant, used to act upon the credit of his master, went against the orders of the master, was a fact that could not be known to a third person) he quitted his opinion; but directed the counsel to move the court of *B. R.* which was accordingly done.

Salk. 442. The substance of what was said upon the motion, in favour of the master, was, that the servant going contrary to his orders, and there being no subsequent consent of the master, who knew nothing of the matter, the act of the servant should not bind the master, according to the cases of *Ward and Evans*. *Micb. 2 Ann. Hanky and Watts, Thorold and Smith, 2 Cro. 471.* Master commands his servant to sell his horse, servant sells him as a good one, no action against the master.

But the court were all of opinion, that the verdict was well given, and that the master was chargeable, and he only: for a servant by transacting affairs for his master, does thereby derive a general authority and credit from him; and if this general authority should be liable to be determined for a time, by any particular instructions or orders, to which none but the master and servant are privy, there would be an end of all dealing but with the master.

The master has put himself in the power of the servant, by trusting him with the bill. *Monk and Clayton* was a case, where the act of a servant, though out of place, bound his master, by reason of the former credit given him by his master's service, the other not knowing that he was discharged. And as for the cases put, there was this main difference between them, that nothing came to * P. 111. * the master's use; as here the notes did. In some of those cases there was a *prior* debt, but none here.

It was agreed by the court, that the property of the note was not transferred and vested in *B.* but was only in nature of a *depositum* or security to him, for there is no indorsement; nor could he have sued upon the bill; and though practice cannot alter the law, yet it may explain an agreement.

They were likewise of opinion, that the master could not recover it of the servant, the loss being occasioned by a meer accident, and not either folly or negligence.

If

Michaelmas Term 11 Ann.

If a master frequently send a servant to market without ready money, so that the servant is trusted upon the master's account, if in such a case the servant imbezils money when he is sent with it, and buys upon trust, master is chargeable; *contra*, if always sent with ready money. 3 Keble 625.

Arne *versus* Johnson. B. R.

AN action was brought for these words spoken of an upholster, *You are a soldier, I saw you in your red coat doing duty, your word is not to be taken.* Action for words.

The words ruled to be actionable; because it is known to be a common practice for tradesmen to protect themselves against their creditors by a counterfeit listing; nor can it be worth a tradesman's while for any other purpose, but defrauding his creditors, to subject himself to the power of an officer. A soldier has by act of parliament, which the court must take notice of, the privilege of not being held to special bail; and those words, *your word is not to be taken*, is plainly an inference from the former.

* Alice *versus* Gale. B. R.

* P. 112.

A Man may plead in bar, or abatement to a *scire facias*, as well as to other actions. Plea in abatement.

It is the conclusion of a plea, and not the matter of it, that makes a plea in abatement: so that should a man plead a plea, that for the matter of it might have been pleaded in bar, and conclude *petit quod breve cassetur*, it would be but a plea in abatement; and the judgment could be no other than a *respondeas ouster*. So *vice versa*, a plea in abatement, pleaded in form of a plea in bar, would be a plea in bar, though an ill one. To a *scire facias*, the plea in bar is always concluded by an *executio non*, as in other cases by an *actio non*. It is the conclusion, not matter of the plea, that makes it a plea in abatement, or in bar.

If a defendant pleads a plea in abatement, and the plaintiff replies as to a plea in bar, this is a discontinuance. Discontinuance.

* Hilary

* P. 113.

* Hilary Term

II Annæ. C. B.

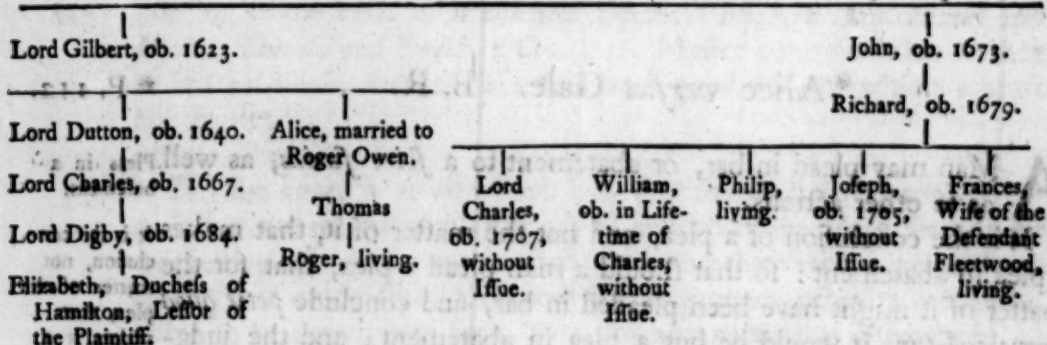
f. l. { Com. 207.
S. C.
Sura. 318.
Ant 356. 406.

Thornby and Fleetwood, alias Dutcheffs of Hamilton's case.

Vide post. Hil. 3 Geo. 1. & Trin. 4 Geo. 1. 406.

Pedigree of the Case found by the Jury.

Thomas Lord Gerard ob. 1617.



This was an ejectment in the court of Common Pleas, which ended in a special verdict, wherein the jury found, that Charles 1. Lord Gerard, in November 1660, settled the estate in question, to the use of himself and the heirs males of his body, with remainder * to the heirs males of the body of Thomas first Lord Gerard, remainder to his own right heirs. In 1684. Charles 2. Lord Gerard, upon the death of Digby Lord Gerard (only son of Lord Charles) without issue male, entered upon the estate in question (not in jointure) claiming the same as heir male of the body of Thomas first Lord Gerard, by virtue of the said limitation in that settlement; and by virtue of this title enjoyed this estate above twenty-two years, and the residue when the jointure fell in; and during the time of this his enjoyment, suffered several recoveries, and settled the estate upon his marriage in the year 1689. and died without issue in the year 1707. leaving Philip his only brother then surviving, who is heir male of Thomas first Lord Gerard, and is now living

* P. 114.

Hilary Term 11 Ann.

Charles and his brother Philip were in the year 1676. sent by their father to St. Omers, and educated there for five years in the Roman religion, which religion they professed. The last Lord Charles died in 1707. and upon his death the Dutchess of Hamilton claimed the estate, as right heir of the first Charles Lord Gerard; notwithstanding the estate-tail, limited to the heirs males of the body of Thomas first Lord Gerard, still subsists in Philip; alledging that the last Lord Charles and his brother Philip being sent abroad, and educated in a popish seminary, are made so utterly incapable of taking any estate, that she has the right of entry.

The grand question was, whether one brought up in a popish seminary, was, notwithstanding any incapacity by him incurred on that account, still capable of suffering a common recovery?

Sir Thomas Powys insisted for the plaintiff, that the statute *primo Jacobi* did incapacitate a person sent beyond sea, not only from a pernanacy of the profits, but from having the estate ever vested in him.

Argument for the plaintiff.
First point.

* He insisted secondly, that this statute, as to this point, stood * P. 115. unimpeached by the subsequent statutes of *tertio Jacobi*, and *tertio Caroli*.

Second point.

In *Day and Savage*, in *Hobart* 87. it is indeed said that an act of parliament may be void from its first creation, as an act against natural equity; for *jura naturæ sunt immutabilia, sunt leges legum*. Maxim. But this must be a very clear case, and judges will strain hard rather than interpret an act void *ab initio*.

First point.

The words of the act of parliament, as to the incapacity are, *Shall be incapable in respect of himself only, but not his heirs or posterity, to have, inherit or enjoy, any lands, tenements, goods, chattels, &c.* Words so comprehensive, as must take in all manner of ways, whereby an estate can vest in a man; unless restrained by some after limitations. Now the words of restriction or limitation are those, *In respect of himself only, but not his heirs or posterity*.

Roman catholics.
Stat. primo Jacobi, what incapacity it lays upon them.

Here it was observed, *first*, That this rather confirmed the disability in him, according to the known rule, that *exceptio firmat regulam in rebus non exceptis*. *Secondly*, That though a saving might qualify and restrain the purview, yet it was never allowed to overthrow it quite. The purview says, He shall not have, enjoy, inherit; the saving (as is pretended) says, he shall. *Thirdly*, This interpretation quite overthrows the intention of the restriction itself: for it was a saving intended in favour of the issue and posterity; but according to this interpretation, the saving is fatal and prejudicial to them; for it gives the person so educated a power of alienating, which power he will very probably execute in case of a protestant posterity; whereas, according to our interpretation, the estate never vesting in him, he cannot alien.

Maxim in law.

Hilary Term 11 Ann.

* P. 116. As to the question that will be asked, who shall have the estate in the mean time, if so be that he is not to have it, and yet his issue if he should have any, must have * it after his death? I answer, there is a difference when the incapacity is in *him*, that is to take by *purchase*; and when in *him*, that is to take by *Descent*. For where the first purchaser is incapable, there none shall take that must derive their title under him; but where the incapacity happens in course of descent, there the estate will go over to him, to whom it should go, if the person made incapable were really dead.

Descent.
Monk,
Alien.

Tenant in tail has issue two sons, eldest is a *monk*, or an *alien*, or abjures the realm; in all these cases the younger brother shall inherit. 1 *Inst.* 132. *Belknap's case*. In Lord *Delaware's case*, 11 *Rep.* it is true indeed, that he did not sit in the house of Lords in his father's life-time; but to this it may be answered, 1st, That it did not appear the son ever attempted it, and so brought it legally in question. 2^{dly}, 1 *Inst.* 155. A great difference is made between a title of honour, which may be suspended, and a freehold which cannot. Had our case been that of an heir, there had been more difficulty in it, because of that maxim in law, *non est haeres viventis*; though even then the word *heir*, may in an act of parliament, be understood in the vulgar acceptation of the word, *viz. heir apparent*.

Maxim of
law.

It may be objected from the clause, *That if such a one shall conform, &c. that from and during the time of such his conformity, he shall be freed and discharged from the aforementioned incapacity*, that this proves the estate to have been in him before. But to this it is answered, 1st, That the intention of the proviso was, that after the time of his conformity, he shall be capable of taking any estate that should afterwards come to him; not that he shall then have that very estate, which at the time when it descended he was incapable of taking, and by reason of this incapacity never vested in him, and was now actually vested in another. But 2^{dly}, admitting that to be the meaning of the *proviso*, the inference is by no means just. For nothing more common * than for estates to devest out of one, and vest in another; as where a man dies, leaving his wife big with a son, &c. 3 *Rep. Lincoln College case*.

* P. 117.
Vesting and
devesting of
estates, com-
mon in law.

It was urged further in favour of this interpretation, that the very same words that were made use of with respect to disabling him in real estate, were made use of to disable him in personal estate, and that therefore they must have the same interpretation; but to understand them of taking the profits of goods, money and chattels, &c. absurd. It was said that this interpretation was more agreeable to common sense, and what every body but a lawyer would make.

It was observed, that the other interpretation quite took away the penalty of the act; for who will be at the cost and trouble of a suit to hinder such a person from enjoying the profits, when by alienation

Hilary Term 11 Ann.

alienation he may in a moment exclude him from all advantages of his suit?

Summa est lex quæ pro religione facit; acts of parliament made for the advancement of religion, must receive as strong an interpretation for the attainment of that end as possible, *Hobart* 157. and sure, it cannot be doubted but the act we are now upon is such a one.

Maxim of law.

Again, it is another maxim, that acts of parliament, made for preventing of publick mischief, though penal ones, may yet be extended by equity; and this act of parliament may likewise be considered under this notion too, popery being a conspiracy against the state, as well as religion.

Acts of parliament, though penal, sometimes extended by equity.

It is a rule both in civil and common law, that *in dubio, hæc legis constructio quam verba ostendunt*: So that *cæteris paribus*, our interpretation the better, because most literal.

Maxim of law.

It was in the next place argued, that this act *primo Jacobi* stood unimpeached and unrepealed, as to this point, by the statute of 3 *Jac.* or 3 *Car.*

Second point. *Primo Jacobi*, not repealed by *tertio Jacobi*, or *tertio Caroli*.

* It must be admitted, that the rule, *posteriores leges prioribus derogant*, is a true rule: but then at the same time it must be remembered, that these repeals by implication are things disfavoured by law; never allowed of, but where the inconsistency and repugnancy is plain, glaring and unavoidable. For these repeals carry along with them a tacit reflection upon the legislators, that they should ignorantly and without knowing it, make one act repugnant to, and inconsistent with another; and such repeals have been ever interpreted so as to repeal as little of the precedent law as is possible.

Maxim.

* P. 118.

Repeals by implication odious, and why.

11 *Co. Rep.* 56. 1 *Rolle's Rep.* 88. *Foster's case*.

It was argued from the occasion of making the act *tertio Jacobi*, viz. the *Gunpowder treason*, that it could be no inducement to the legislators to take off any difficulty or incapacity already laid upon the papists, but quite contrary. And as the occasion could not move them to it, so their intention through the tenor of the act looks quite another way; and surely not reasonable to suppose that they would lay upon them more incapacities of a lower nature, as law-practice, physick, &c. and take off those of an higher nature.

It was said further, that the persons, subject-matter, and penalties of this act, are all different from those of *primo Jacobi*; and could not therefore be a repeal of that.

As to the 3 *Car.* 1. *cap.* 2. it was observed, that this very act was a proof that *primo Jacobi* was not repealed by *tertio Jacobi*; for the preamble of 3 *Car.* takes notice of this act *primo Jacobi*. as an act in force, and that ought to be put in execution, but takes no notice at all of 3 *Jacobi*; so that supposing it repealed by 3 *Jacobi*, it would stand revived by *tertio Car.* As to what follows in 3 *Car.*

it

Hilary Term II Ann.

it would be very material, were it our case, which it is not: for *tertio* Car. has respect to estates already vested; but, in our case, the person was disabled from taking before the descent, so that the estate never vested in him.

* P. 119.

Argument for
defendant.

* Serjeant *Cbesbyre* pro defendant, Argued, That supposing *primo Jacobi* was, as to this point, yet in force, it did not hinder the estate from vesting.

It was observed, that the *purview* and *saving* were not, as was insinuated, separate and divided sentences; but inseparably conjoined and incorporated together.

Maxim.

The maxim *summa est lex quæ pro religione facit*, must be admitted as a true maxim; but from hence it does by no means follow, that we are to make the most rigid and severe interpretation we can, though contrary to our reason and understanding, this were to be guilty ourselves of what we so justly condemn in the *Roman* catho-
licks.

It has been said, that their interpretation is more obvious to the vulgar; our's such as none but lawyers could approve. This, put into other words is a confession that our's is the interpretation of the most learned and competent judges, their's of the ignorant and un-
learned.

The death of *Charles* without issue, can occasion no difference in the construction of an act of parliament; for *that*, surely, must not depend upon contingencies, such as dying with, or without issue. I will therefore for argument sake suppose that there is a son of *Charles* now living. Then, the *case* before us would be *that* of a father guilty of the offence and the son innocent, the *question* upon this act of parliament, What becomes of the estate-tail? why they say, this act of parliament is to enure as a revocation of that part of the set-
tlement, as if the name of such an offender had never been in it; but certainly this goes too far, for it quite excludes his posterity, contrary to the plain intention of the act. An heir can never take but by descent from his ancestor; but this is impossible, on suppo-
sition that the estate never vests in the ancestor.

* P. 120.

* *Alien*, tenant in tail, remainder to a *subject*: he in remainder shall never come in, until the estate-tail be spent; though the *alien* be incapable of taking an estate-tail for his own benefit.

A devise to *B.* after the death of a monk without issue; nothing passes to *B.* until the death of the monk without issue. 1 *Leon.* 195. *Scatterwood* and *Edge*, *Trin.* 9 *W.* 3. *Fuller*, 3 *Cro.* 432.

Salk. 229.

If it be objected, that the law will never cast an estate upon a per-
son disabled to take, (*alien*, attaint, &c.) it may be answered, that this comes not up to the case in question; because the very same act that provides for the disability, excepts the heirs and posterity.

A remainder can never take place but upon the ceffer of an estate-
tail; but if the estate never vested in the father, it could not in
the

Hilary Term 11 Ann.

the son, nor in the remainder; for an estate which never took effect, can never be said to cease.

Shelly's case, 1 *Rep.* was quoted, to prove that the son may have an estate by descent, though it never vested in the ancestor; but well observed it proves no such thing.

This dilemma, then, remains plain and strong upon them, that either the estate must vest in the father for the advantage of his posterity; or else the posterity must be excluded, contrary to the plain intention of the act.

As to the act of parliament, it has plainly a twofold view; the first is to discourage popish education abroad; the second is to save the estate for their posterity: it ought therefore to have such a construction put upon it, as that both intentions may stand together; and this they will do, if the father be made to lose the profits during his non-conformity. But then the difficulty is, who shall take the profits in the mean time? and in this point it must be acknowledged, that the act is silent; and therefore according to the common rule, where * an act gives a penalty, but does not say to whom, there the * P. 121. crown shall have it.

It is true, that where a penalty is given by way of damage, that there, though not said to whom, the penalty shall follow the loss; and this difference is taken, 2 *Ventris* 267. *Moore* 238.

This is not an interpretation that lowers the penalty of the act; for what is the land but the profits of the land? and a grant of the profits, does even in law carry the land along with it; and certainly, no where could the pernancy of the profits be lodged better than in the crown; Who so zealous and able to put the law in execution? *Tutissima est custodia quæ sibi creditur.*

Maxim.

Before the statute of *Hen* 8. by which entailed land was forfeited for treason, the land was preserved, in case of treason, to the children, by general, and as Lord *Hobart* 340. terms them, cunning words. And if tenant in tail, before those laws in *Hen* 8. had, after forfeiture for treason, been vouched in a common recovery, the recovery would have barred the issue.

As to the cases brought to prove, that there is no difficulty for estates to divest out of one and vest in another, as in case of an after-born child, &c. it may be answered, that these cases are not to the purpose; because it is the same estate that is divested out of one, and is vested in another; but here we are in the case of a remainder, which is another estate.

It is against the rules of law, that *Philip* should be dead as to the remainder-man, but alive in respect to his issue, if he should have any; and that the same estate should cease as to one, and revive as to another. 9 *Rep.* 140. *Beaumont's case*.

It was observed, that this act disabled him from purchasing with respect to himself only, but not with respect to his issue; and that he might purchase to lose the profits, but not to retain them; and

Hilary Term 11 Ann.

that if this interpretation might be put upon the word *purchase*, it must * likewise be put upon the word *inherit*, for they are joined both together.

It was added in favour of this interpretation, that a person attainted may take by descent; but then indeed it is not for his own advantage, but that of the crown. So for the *alien*. The same law as to a *villain*, for the advantage of his lord. And surely *Charles*, or *Philip*, not in a worse condition than *aliens*, *villains*, and persons attainted.

As to what was said to Lord *De la Ware*'s case, that had he attempted it, he might possibly have sat in the house of Lords, living his father: it seems a strange punishment, that the father should not be allowed to sit in the house of Lords himself, but he may send his son thither, to act and vote, just as he himself would do.

As to the interpretation put upon the clause concerning conformity, that this comes too late after the descent of the estate; it does in a manner subvert the chief design for which the clause was put in, *viz.* an encouragement to conformity. For children are sent over very young; and if after the descent, no advantage is to be gained by conformity, there will remain but little time, wherein this clause can be any inducement to them to conform.

As to the objection, that this interpretation gives them a power of alienating: it may be said, that this power is not properly given, but only remained as a consequence of the estate that was still in them. And even the stat. of 11 *W.* 3. does not go about to restrain a papist from alienating.

As to the *second* point, That the statute *primo Jacobi*, stood repealed, by reason of the inconsistency there was with the subsequent statutes: it was said, that all three statutes had the same end in view, but differed in the means of promoting it.

* P. 123. * It was denied, that a repeal by implication is any reflection upon the legislators; nothing more common than to repeal in one session, laws made in another. How many laws are made temporary upon this very consideration, that they are not sure how well they will answer the design of their institution? in a word, it is no reflection, that men are but men.

As to what was urged from the occasion of making this act, *viz.* the *Gunpowder Treason*: it was acknowledged, that the design of the parliament was rather to lay more hardships upon the papists, and make more effectual laws against them; and accordingly three great defects in the act *primo Jacobi*, are all supplied by *tertio Jacobi*. The first defect is, that *primo Jacobi* hinders not, but that persons might be sent abroad to be bred papists; provided they were not sent to seminaries and colleges, &c. but 3 *Jacobi* provides against this. 2^{dly}, The penalty not being given to the informer, no encouragement to prosecute upon the act; but this altered by *tertio Jacobi*.

Hilary Term 11 Ann.

3dly, An Act silent who shall take the profits in the mean time; and though they must therefore go to the King, yet he is according to the phrase of our books, *occupatus de arduis negotiis Regni*, and will often let such matters escape his notice; but this is settled by *tertio Jacobi*, in the next of kin.

According to the interpretation the plaintiff would put upon the statute *primo Jacobi*, it may happen, that a Roman catholick, unfortunately happening to have a foreign education, shall be excluded, only to make way for a rigid papist bred at home.

Tertio Car. goes further than any of the former; the purview is greater, and so is the penalty.

As to the objection, that *tertio Car.* takes notice of *primo Jacobi*, as a law in force and fit to be put in execution; and that supposing it was repealed by *tertio Jacobi* it would stand revived by *tertio Car.* It was answered, that it was not repealed by *tertio Jacobi* in the whole, but in part only: that the act *primo Jacobi*, * contains * P. 124. several provisions that are not either in *tertio Jac.* or *tertio Car.* as 1st, Very penal upon the officer of the ports, that shall suffer them to pass; 2dly, Very penal upon the master of the ship; and 3dly, Upon the mariners. And for the sake of the unrepealed clauses, the statute *tertio Car.* takes notice of the act, as an act still in force, and what ought to be put in execution.

Then a great deal of time was taken in proving the act *primo Jac.* to stand repealed by *tertio Jac.* from the inconsistencies of the one act with the other.

Pardon.

After this, it was insisted upon, that there had been several general pardons, and one particularly in the year 1690. by which the offence being pardoned, the disability was so *ex consequenti*. And this pardon coming out before the death of *Charles*, viz. before *Philip* now living could make his claim, must have the same effect, with respect to him, as his conformity would; and for this purpose, 3 *Levinz* 332. was quoted.

It was further urged, that *Charles* by his entry had gained a tortious fee, which was sufficient, until defeated, to maintain the recovery. 3 *Rep.* 59. *Hobart* 262.

Land given to an *alien* in tail, *alien* suffers a common recovery: recovery good; for an *alien* a good tenant to the *præcipe*, until office found. The same law for a person attainted.

A monk is indeed said to be dead in law; but that is a meer contrivance for the advantage of the papal grandeur. For if the monk should be afterwards made a bishop, he is then alive to purchase for the benefit of his church; for as Lord *Coke* informs us in another place, the rule is to be interpreted for the church, not against it. If now *Charles* may be allowed to purchase for the advantage of his issue, as a monk for that of the church, the case of a monk will be an authority for us; for *Charles* by his entry while incapacitated, committed an act of disseisin, which may be considered

Hilary Term 11 Ann.

* P. 125. dered * as a new purchase, a word used in the act *primo Jacobi Goldborough* 102. 4 *Leon.* 84. Many are the authorities which prove a monk may be disseisor; but it particularly appears to be so by this, that a writ of assise lies against a monk, the judgment in which writ is *quod recuperet seisinam*, which supposes a monk to have a freehold. It was added, That common recoveries are favoured in law, especially when suffered in favour of a purchaser for a valuable consideration, which is the present case, being *that* of a marriage with 10,000 *l.* portion, besides twenty-five years unmolested possession under the common recovery. See *post.* 356, 406.

Case of University of Cambridge. B. R.

Case was, University of Cambridge had a charter granted to them by Queen Elizabeth, whereby cognitio placitorum, with exclusive words non alibi, &c. was given to the court of the Vice-chancellor, to proceed secundum legem & consuetudinem universitatis, in all cases where any of the body of that university should be defendants; which charter was confirmed by act of parliament, of which they produced a copy. And, whether this claim should be received was the question.

AN action of assault and battery was brought against one of the members of the university of Cambridge, and a general imparlance given from one term to another. The Chancellor of the university comes and claims consuance of the pleas, by virtue of a charter in Queen Elizabeth's time, whereby *cognitio placitorum*, with exclusive words *non alibi*, &c. was given to the court of the Vice-chancellor, to proceed *secundum legem & consuetudinem universitatis*, in all cases where any of the body of that university should be defendants; which charter was confirmed by act of parliament, of which they produced a copy. And, whether this claim should be received was the question.

Vice-chancellor, to proceed secundum legem & consuetudinem of the university, in all cases where any of the body are defendants; which charter was confirmed by parliament. Resolved, that after imparlance, it was too late to make that claim.

That it should not, was thus argued by Mr. Page, Mr. Lechmere, and Mr. Whitaker.

Argument against the university.

* P. 126.

It was said, and admitted to be so by the court, that such a grant was not good of itself, without the help of an act of parliament. For though the crown may * grant consuance of pleas to proceed *secundum legem terræ*, it cannot to proceed by other laws; for *that* would be to make new laws, which the crown, as being but one branch of the legislative power, cannot do.

A copy of an act of parliament no evidence, unless the act had been before allowed of, and so made a record of this court; for otherwise nothing shall be allowed of, as a sufficient evidence of the act, but the exemplification of it under the great seal. And the reason is, because the court is party, which cannot pray *oyer* as the party may; so that the court would be in a worse condition than a common person, if they were to receive for evidence a copy offered them. 35 *H.* 6. 14, And this was allowed to be so *per cur.*

In

*But see contra
Law of King Br. as by
Bulles 2. ed. 225.*

Hilary Term 11 Ann.

In *Hardr. Rep.* case of *Castle and Litchfield*, conusance of pleas is said to be of three sorts: 1st, *Tenere placita*: and this is where the courts are co-ordinate, and have a concurrent jurisdiction; in which case, priority of suit only gives one court the preference to the other.

Conusance of pleas triplex.

2^{dly}, *Cognitio placitorum*: and this must be limited as to place.

3^{dly}, *Cognitio placitorum* with exclusive words & *non alibi*: and this may follow the person, and need not be confined to any place.

The difference between *cognitio placitorum* without exclusive words, and when with, is not, that the last has an exclusive jurisdiction, the former not; for *cognitio placitorum* does, *ex vi termini*, exclude all other courts, and imports the words & *non alibi*. *Palmer 406. Rolle's Abr. 489. Terms of the law, tit. Conusance.*

Difference between conusance of pleas with, and without exclusive words.

But the first difference is, that the former must be local, confined to some place; the latter may follow the person, and be as to place universal.

* Secondly, In the former, if the lord waive his privilege, there shall be re-summmons, and proceedings shall begin where they left off; but in the latter, in case of waiver or the like, the proceedings in the court excluded by this jurisdiction must begin *de novo*. * P. 127.

Thirdly, The former is for the advantage of the lord only, and therefore the lord only can claim it, and not the party; but where there are exclusive words, the party may claim it as well as the lord: in *Moore 249, 276. 9 Hen. 7. fo. 10, 11, 12.* these differences fully and clearly laid down.

Here it was observed, that the third sort of conusance of pleas, which was with exclusive words & *non alibi*, that even this did not go so far as to make a nullity of proceedings in courts of law.

Then it was said, that this claim being made after imparlance, was too late, and that the University had lapsed their time.

In *Rasfall's entries* all claims of *cognitio placitorum* are entred before imparlance. 3 H. 6. fo. 10. 14 H. 4. 20. *Hill. Shower's Rep. 352. University of Oxford. 16 H. 7. 16. 5 Ed. 2. 159. Pasche. 35 H. 6. 24.* too late to claim conusance of pleas after es-foin, and by parity of reason after imparlance. 6 H. 7. 9. Though an imparlance be only given to a day in the same term, it is doubted, whether even upon such an imparlance, it was not too late to pray it? 1 *Siderfin 103. Bishop of Ely.* Plea to the jurisdiction not to be received after an imparlance; and this claim of conusance of the same nature with that plea. 11 H. 4. 41. this difference is laid down with respect to the time of claiming conusance, that where the matter is local, so that it appears upon the face of the record, that there is ground for such a claim, it must be made *primo die*, viz. when the writ was returned; but where the matter is transitory, it must be made upon the day given to plead. And the reason of all these cases is this, that otherwise there would be a great delay of justice, unless such claims are made as soon as possible. * P. 128.

Conusance of pleas, when to be claimed.

Hilary Term 11 Ann.

In the report of *Hardres* in the case of *Castle* and *Litchfield*, it is said, that upon notice (indefinitely) the court must surcease their plea; from whence it is inferred, that the time of notice is not material: but Mr. *Lechmere* produced a better report of that case in manuscript, whereby it appeared, that nothing said in that case could warrant such an inference.

3 Salk. 383.

From this manuscript it was observed, that the *quo minus*, a device to entitle common persons to sue in the court of Exchequer, did not take away such privilege, if demanded before imparlance. It was also observed, that the Lord Chancellor is included under the word *Iusticiarius*.

If it should be objected, that these authorities are not to the purpose, because it was not the same kind of consuance that was claimed in *them* as *here*. It may be answered, that there is nothing in the nature of the consuance now claimed, that can give the least shadow of reason, why longer time should be allowed for claim *here* than in those. For *first*, though some of them should be only consuance of pleas without exclusive words, yet that can make no difference; since *ante ostensum*, that *cognitio placitorum* does, *ex vi termini*, import an exclusive jurisdiction.

Secondly, The difference between these two, that the latter, *viz.* that now claimed, is for the advantage of the party as well as the lord, and may therefore be claimed by the party as well as the lord, is rather a reason why less time should be allowed for this claim, than why more.

Thirdly, This being a claim of a consuance, where the proceedings are to be, not *secundum legem terræ*, but *Universitatis*, ought rather to be disfavoured, and have less time allowed for that claim than where the proceedings are to be *secundum legem terræ*. 27 H. 8. c. 24: this reason * is given for the resumption of many franchises, that they are derogatory to the prerogative, and tend to the delay of justice.

* P. 129.

Argument for
the university.

On the side of the university it was argued, that though there is good reason why there should be a time fixed, as soon as possible, for the party himself to make his claim, yet there is no such reason for the university, who is a stranger to the whole proceeding, to be so bound down.

It was said, that this was a personal privilege, and therefore the person might be arrested out of the jurisdiction of the university; so that it was almost not possible, at least not probable, that the university should have notice time enough to make their claim before imparlance.

It was urged, that this was a charter of very extensive words, and confirmed by act of parliament; and was therefore to have an advantageous interpretation.

Hilary Term 11 Ann.

Cro. Car. 9. *Stiles* 90. where after imparlance, a plea of ancient demesne (a plea of the same nature) was received, 1 *Levinz* 89. Justice *Windham* used to say it was very hard, that a stranger should be bound to claim before imparlance.

And to the cases quoted by the other side, this general answer was given, that they were little to the purpose; all of them almost, relating to conusances, that had no exclusive words.

The court were all of opinion, that the claim being made after imparlance, was made too late: that the act of parliament was out of the case; for that related only to the matter of the conusance, and was only necessary to support a charter, which the crown had no power to grant; for though the crown may grant conusances, yet it cannot grant them with power to proceed by any other law than the common law. But as * to the time and manner of claiming, the act is wholly silent; these therefore to be governed by the rules of law. Hence it is, that it is necessary for this privilege to be pleaded; and no reason in the world why the rules of law should not govern as well the time of pleading it, as make it necessary for it to be pleaded at all. There is no difference in the reason of the thing, between conusances with exclusive words and conusances without, as to this point; and therefore all these were esteemed good authorities.

Prerogative.
Crown cannot grant conusances to proceed by any other law than the common law.

* P. 130.

Mitchell and Reynolds. B. R.

THE resolution of the court was delivered by *Parker*, Chief Justice, to the following effect: See ante 27, 85.

An action of debt is brought upon a bond thus conditioned, That whereas *A.* had taken the shop of *B.* who was a baker, for the term of so many years, and had given *B.* so much money for it, the condition of the obligation was such, 'That if during the term afore-
' said, *B.* should not exercise the trade of a baker within the parish
' where the shop was, that then the bond should be void; other-
' wise remain in full force, &c.' And whether this be a good or a void bond is the question.

We are all of opinion, that the bond is good, and that the true distinction is not between bond and promise, that bond should be void and promise good; but between contracts, whether by bond, covenant or promise, entered into upon a just, fair and reasonable consideration; and those entered into upon no consideration or a vicious one, whether it be by bond, covenant or promise, that the former will be good, the latter void.

Trade.
What sort of bonds in restraint of trade good, and what void.

* Cases

Hilary Term 11 Ann.

Restraints of trade.

* Cases of restraint of trade, are either involuntary or voluntary.

* P. 131.

Involuntary restraints.

Restraint by charter.

Involuntary are of three sorts: *1st*, By grant or charter; *2dly*, Custom; *3dly*, By-laws.

1st, By new charter granted, 8 Rep. 121. grant of sole use of a trade void, 11 Rep. 84. but a grant of a trade newly invented, and for a time good, *Godbolt* 125. for the publick has an advantage in the invention of a useful trade, which after a limited time is to be publick; and the inventor's industry is sufficiently encouraged, by the sole use of it secured to him by charter for such a time: but a second grant would be void even in this case; and the statute 21 Jac. 1. limits the time for which such grant may be made to fourteen years.

Restraint by custom.

2dly, By custom: and this is either, *first*, for the advantage of some particular person that has stock enough to serve the place, 2 *Bulstrode* 135. 1 *Rolle* 561. or *secondly*, for the advantage of the corporation or community of a certain place, *Dyer* 279. *Jones* 162. *Carter* 114. 8 Rep. 121. 11 Rep. 53. or *thirdly*, where persons not supposed to use the trade, have yet a prerogative, that no body shall use such a trade within such a compass, without licence from them first obtained; and this is *ratione dominii*. The Archbishop of York, *Register* 105. b.

Restraint by by-laws.

3dly, By by-laws: *Carter* 114, 68. By-laws to exclude foreigners, where there is no custom to justify them, void; but if in affirmation of a custom good, 1 *Rolle* 364. By-laws to cramp and lay difficulties upon trade void, *Moore* 576. 1 *Bulstrode* 11. Stat. 20 Car. 2. But by-laws to regulate trade good, whether they are for the advantage of the town, *Siderfin* 284. *Raymond* 288. or of trade, 5 Rep. 62. 2 *Keeble* 309.

Of voluntary restraints.

Now I come to voluntary restraints: and here,

* P. 132.

1st, All contracts for restraint of trade over all England void, whether by bond, covenant or promise; whether * of that trade a man is brought up to, or any other trade he after falls into. *Cro. Eliz.* 872. 2 *Cro.* 596. *Allen* 67.

2dly, Contracts to restrain trade in a particular place, void; if not done upon a fair, just and good consideration. 2 *H.* 5. 5. b. The main case to this point, *Moore* 115, 242.

3dly, Where the contract for the restraint of trade in a particular place, appears to have been made upon a fair and just consideration, the contract is good; be it by bond, covenant or promise, 2 *Bulstrode* 136. The case there not well stated; but may be found 11 Jac. Rot. 223. 2 *Cro.* 596. *Jones* 13, *Joliffe* and *Brode*. A remarkable case. The plaintiff and defendant were mercers, living near to one another; the defendant desired the plaintiff to buy his old goods, which the plaintiff did at such a price, upon consideration that the defendant would not exercise his trade within such a place. In this case

Hilary Term 11 Ann.

case it was first observed, that it was a voluntary restraint; and the rule is *volenti non fit injuria*. Secondly, That it was made upon a valuable consideration; the use of his trade being compensated to the defendant, by the price given him for his old goods. Thirdly, That the agreement was neither *malum in se*, nor *malum prohibitum*. Fourthly, A man may bind himself not to live in such a place; and by consequence not to trade there. Fifthly, These kind of bonds are very frequent in *London*.

In this case the material difference I first laid down is established; and the judgment in this case, as appears 2 *Cro.* 597. was affirmed upon error in the Exchequer-chamber.

Palmer 172. *March* 17. *Allen* 67. A remarkable case. And the stress was laid upon the consideration; not whether it was by bond, covenant or promise.

Shower's Rep. 2, 3. where (though but an imperfect report) the case was of a restraint from buying of a particular person, and the same difference taken. 2 *Saunders* 155.

* I shall now make a few useful observations:

* P. 133.

As 1st, That a restraint, to obtain the sole use of trade through all *England* is void; for it is a monopoly. Observations.

2^{dly}, That a restraint from using one's trade in a particular place, if done fairly, and upon a good and lawful consideration, and with no ill intention, is good.

3^{dly}, That this is not in itself unlawful or unreasonable, for then custom could not make it good, all unjust and unreasonable customs being void.

4^{thly}, That since it is agreed on all hands, that an action upon the case would have lain, which concludes *ad damnum*, and there can be no *damnum absque injuria*, it follows, that the law reckons the breach of such a contract, an unjust and injurious action.

5^{thly}, That it is not unreasonable to enforce by-laws with a penalty; since no by-law, which is either unjust or unreasonable, can ever be good.

6^{thly}, The restraint of it must be upon good consideration, and the breach of it must apparently tend to the damage of the other; for else the restraint void, though for a particular place.

I shall now give my reasons, why of involuntary and voluntary restraints some are void, others good.

And, first, For involuntary; grants, charters, &c. erecting monopolies, void for two reasons. 1st, Because against the freedom and birthright of the subject. 2^{dly}, Because contrary to *Magna Charta*.

But it is otherwise where the grant or charter is to enforce a custom; for if the custom be good, the charter enforcing must be so too; or where the grant or charter is made for the good regulation

Hilary Term II Ann.

and government of trade; for the publick good is ever to be preferred to a private loss.

Next, In giving the reasons of voluntary restraints, I shall proceed; first, *Negatively*, and shew what are not the * true reasons; and secondly, *positively*, and point out the true ones.

1st, That they are against *Magna Charta*, no good reason; because *Magna Charta* provides against force and power, not voluntary acts of men.

2^{dly}, That they are against the liberty of the subject, no good reason; for what a man parts with is no longer his own. If I sell my liberty to trade, it is no longer mine, but his to whom I sell it.

3^{dly}, It is not a good reason, that the condition is against law in a proper sense, 1 *Inst.* 206. *b.* for every thing that is against law in a proper sense, must be either, first, *malum*, 1 *Inst.* 206, 216. *Perkins* 139. *Carter* 229. 2 *Keble* 140, 153. Or secondly, Omitting or neglecting what is a man's duty. *Palmer* 172. *Fitzberbert* 13. Or lastly, Encouraging the commission of an evil action, *Brook Condition* 34. 2 *Hen.* 4. fol. 9. *Hobart* 12.

I say conditions against law in a proper sense, must fall under one of these heads. And this last head explains the reason of the difference, taken 1 *Inst.* 106. 8. between a feoffment and a bond: that a feoffment to a man upon condition he will kill *B.* shall be good; but a bond with such a condition void. For in the one case, lest the man should have any temptation to do the act, the law secures to him the possession of the land, without performing the condition; and, in the other, frees him from the penalty of the bond; so that the law has the same end in view, in making the feoffment good, and the bond void, viz. the prevention of the fact.

Wherever there can be a way found out to perform the condition without breach of the law, the bond shall be esteemed good. *Perkins* 778. 1 *Rep.* 22. *a.* *Hobart* 12, *Norton* and *Syms.* 3 *Cro.* 705.

All things that may be prohibited by law, may be so too by the condition of a bond. 13 *H.* 7. 23, 24.

* P. 135. * The condition of the bond before us is neither *malum in se*, nor *malum prohibitum*; for then neither custom nor covenant could make it good.

I come now to shew *affirmatively* what are the true reasons, why of contracts in restraint of trade, some are void and others good.

1st, Because it is a depriving the party of a means of a livelihood.

2^{dly}, Because of the great abuse such bonds are liable to; as the enabling corporations to exclude foreigners, which they have no right to do; and masters to lay hardships upon their servants, apprentices, &c.

Hilary Term 11 Ann.

3dly, Because it is a condition of no use to the other party. *Puffendorf de jure natura*, lib. 5. cap. 2. sect. 3. makes all useless agreements, as an agreement not to wash one's hands, &c. void. 21 H. 7. fol. 20. *Cui bono* is ever of great weight in all agreements.

4thly, There may be several cases, where agreements for restraint of trade in particular places may be of advantage to some, and no disadvantage to the rest; and there they are good: as for example, where a town is overstocked with persons of the same trade; or in case before cited of *Joliffe* and *Brode*, where a man grown old and unable to carry on his trade without blunders, and having a good accustomed shop, *quid damni* in such an agreement, as was there entered into, to either? but an apparent advantage to both.

5thly, Those contracts in restraint of trade are void, where the performance is attended with an immediate and apparent damage to the one side, only to free the other from the fear of a distant damage, that may or may not happen. Case of *Taylor* of *Ipswich*. In the case of *Barrow* and *Wood*, *March Rep.* 191. it is said, that an agreement not to sow one's land is void; but the case of *Mich.* 7 Ed. 3. 64. upon which this assertion is founded, warrants no such general position. *Allen* 67.

* 6thly, Supposing it did not appear in the condition of the bond, * P. 136. whether it were upon a fair and just consideration or not; are these bonds *prima facie* to be esteemed void? or shall they be esteemed good, until the party for whose advantage it is, shew in evidence the illegality of the consideration upon which they are founded? I answer, first, as to equity, the law might be settled either way, provided it were known. But secondly, as the law now stands, they are *prima facie* void; and for these reasons: 1. On account of the benignity of the common law, and the tender regard it has for the liberty and right of the subject. 2. For the apparent mischief to one side, and no visible advantage of the other side to counterbalance it; which mischief, in the first place, is not barely a private one, but has an influence upon the publick, *that* being interested in a man's trade. And in the second place, there is not only a visible prejudice of the one side, and no *apparent* advantage of the other, but a great probability that there is none; since to its being an advantage to a man to leave his trade, so many special circumstances necessary, as are never to be presumed, where they do not appear.

Hinc Constat, 1st, That all bonds for restraint of trade, and no reason given, are *prima facie* void.

2dly, Where the condition of the bond assigns a just and fair reason, the bond is good, until that reason can be falsified.

3dly, From hence it appears, why a bond for restraint of trade all over *England*, be the consideration what it will, is void; because without doubt, some place or other may be found, where the party

Hilary Term 11 Ann.

party entering into such a bond may use his trade, without any prejudice to the obligee; unless the obligee intend by this bond to make a monopoly of the trade, which reason is better let alone than given.

4thly, By this, the difference taken in some of our old books, between bond and covenant or promise, may be very well accounted for, *viz.* because upon a bond, * there is no necessity for the reason and nature of the contract to appear; whereas in promise or covenant, the whole nature and all the circumstances of the contract, must appear to the jury, before they can determine the damages they are to give for the breach of the covenant.

5thly, This not only accounts for the judgments given, but also the expressions used in those cases; as 2 H. 5. the consideration of the bond not appearing, and therefore being to be presumed an oppressive bond, the indignation of the judge, though not the way of expressing it (swearing) may be excused. Perhaps it was such a case as *this*, A weaver forced by the necessity of his circumstances to sell to his loss, another takes him thus chagrined to the tavern, where for a trifle he extorts such a bond from him, and when the cries and tears of his half starved wife and children call him again to the loom, this bond is put in suit against him. This were a crime, I am at a loss to find a name for; if according to *Puffendorf*, by the laws of nature, useless contracts are void, how much more oppressive ones?

And now I come to consider the case of 3 *Levinz* 241, wherein it is said, that such a contract by *bond* is void, by *promise* good.

And here *1st*, Upon the face of it, this appears very harsh doctrine. For a bond may be considered in a twofold respect; first, as a security for not breaking this contract; and can a man be bound too fast, not to break his word? secondly, The penalty may be considered as a compensation for the breach of the agreement, as a price of repurchasing the liberty restrained by the bond; and this settled by persons of full age, that are both most capable of it, and have likewise the best right to do it.

As a man may *cedere suo jure*, so he may do it upon what terms he thinks fit. A man may say, I will not absolutely exclude myself from doing such a thing; but I will * bind myself in a bond of such a penalty not to do it, that so if I think fit to forfeit the penalty, I may be at my liberty, *vide Bracton, lib. 3. cap. 2.* and certainly very strange, that the law of *England*, that delights so much in certainty, should make a bond void, only because the damages are there ascertained by the parties themselves, who are the properest persons to do it; and make a covenant or promise good, only because the damages must there be reduced to certainty by a jury.

2dly,

Hilary Term 1 R Ann.

2dly, As this is very harsh doctrine, so it was an opinion not at all necessary for the judgment given in that case, which stands unimpeached upon the ground I have all along gone upon in this case; so that it is only the reporter's opinion founded upon *March 77, 191.* a very indifferent reporter. And the reason given for the difference, viz. that in a bond the whole penalty is forfeited; whereas in a contract it was to be recovered in damages to be assessed by a jury, was a reason, that held as well against all bonds in general as *this*.

There can be but two reasons for leaving it to a jury: either that the jury may see whether it is a lawful contract or not; which is proper for the consideration of the court, not the jury: or else, *quia nescitur quod damnum*; but this no reason here, because the *damnum* is fixed by the consent of the parties.

Let it be further considered, that the party can suffer nothing but by being a knave; and shall a court of justice assist a man to play the knave?

Freedom to trade as much bound by consent as custom: and the case of penalties made for the enforcement of such a custom, seems to me a stronger case; for there the party is, as it were, Judge in his own case; whereas here the penalty is fixed by consent of both sides.

Such an agreement in taking an apprentice good; and may be considered not as a prejudicial or restraining agreement, but as a favourable and advantageous one, as putting an apprentice in a capacity of getting his living in any part of *England*, but where it would be to * the prejudice of his master, when without it he can * P. 139. gain it no where.

This case has been compared to *that* of an infant, whom a contract for necessaries will bind, but not a bond.

But this nothing to the purpose: for it stands clearly upon the incapacity of the infant to make any contract at all, but such as shall be for his advantage; and it can never be for his advantage to enter into a penalty. That this is so, is plain from hence, that if an infant and a surety enter into a bond for necessaries for the infant, the bond is good as to the surety, though not the infant: so that it is not the nature of the bond, but incapacity of the infant that makes the bond void.

This case has also been compared to bonds taken by sheriffs for their fees, which are void.

But here 1st, The sheriff by the common law was to take no fees at all for doing his office; and therefore as these fees are given by act of parliament, the act must be strictly pursued.

But 2dly, and principally, those bonds are void from the apparent probability, that they will make use of them to support their oppression.

Hilary Term II Ann.

There is but one objection that seems to have any colour in it, viz. That false recitals of considerations will make those bonds good, that ought to be void.

But 1st, This is to be feared no more than false testimony. 2^{dly}, This special matter may be given in evidence.

To conclude, The bond in the case before us good, and entered into upon a just and fair consideration; for the restraint is exactly proportioned to the consideration, viz. the term of seven years only; and the interest of the publick is not at all concerned.

* P. 140.

* Skinner and Newton. B. R.

See post. 168.
Trespass.
Judgment reversed nisi,
for want of
using the
word *clausum*
instead of *pecias*.

Trespass a
formed action.

TRESPASS in an inferior court, plaintiff declares, that the defendant *vi & armis tres pecias terræ fregit, &c. ipsius* the plaintiff, containing so many acres in such a place. Defendant justifies by prescription for a way. Issue joined, verdict *pro quer.* and judgment accordingly.

Upon error brought it was insisted, that the declaration should have been worded, *clausum terræ* instead of *pecias*. For trespass is a formed action, and no sort of trespass for which a form is not set down; and in those actions for which a form of words is provided by the law, it is not in the power of the plaintiff to use what words his fancy shall lead him to; but he must use the words the law has so appropriated, that they can be expressed by nothing else. Every man's ground is in the eye of the law fenced.

Trespass will lie for the vesture of land; but even there the declaration must be not *vesturam terræ*, but *clausum terræ*. 1 *Inst.* 4. b. 8 H. 6. 9. trespass for breaking into church-yard; held that it must be *clausum terræ*. *Dyer* 285. where a man has only herbage of land, he must declare *quare clausum fregit*. 8 Co. 48. *Web's* case, the difference is taken between these actions that are formed, viz. have set forms of words prescribed for them, and those that have not. Indeed in *Hobart* 51. a variance from the register, in a *formedon*, where the variance was not material, was not regarded. In *Hobart* 84. there is an instance of a material variance from the register, and held good; but then there was this particular reason, that all the course of precedents were of the side of the variation, which must all otherwise have been overthrown. 2 *Ventris* 73. the declaration was *quare clausum * fregit, & diversa onera* of *Gravel*. &c. *per quod viam suam amisit*; Judgment arrested.

* P. 141.

22 *Edw.* 4. 12. a. The word *clausum* imports possession, without which trespass not maintainable; for tenant at will or for years, reversion to another, he in reversion cannot maintain an action of trespass during the life of tenant for years: but *pecia terræ* does not import possession; for *terra revertens*, is *terra* still.

Hilary Term 11 Ann.

It was argued of the other side, that though *clausum* was the word in the register, yet it was but matter of form; and therefore pleadable indeed in abatement, but not assignable for error, after a verdict and judgment. *Moor 422*, *pecias terræ* held good in an ejectment. It is true that judgment was reversed; but the reason why, was, because there was not certainty enough to direct the sheriff what land to deliver to the party, for whom the judgment should pass: whereas here was as much certainty as could be desired; for it was not *tres pecias terræ* barely, but the declaration goes on and says, *ipsius* the plaintiff, (which proves him to have been in possession, and so obviates that objection) containing so many acres in such a place.

Parker Chief Justice, and Judge *Powell*. No want of certainty in this declaration; and after a verdict and judgment, hard for meer form to reverse, &c. Indeed in real actions, that are formed actions, men are tied up strictly to the form prescribed in the register: *Sed aliter* in personal actions.

Judge *Eyre* was of the same opinion, and gave this additional reason, that error does not remove the writ nor plaint, but the proceedings only; and the plaintiff in error, could not be let in to make this objection, but from the one or the other. But supposing the plaint was removed, it could not appear in the plaint; for that is * only in *placito transgressionis super casum*, without going further. * P. 142.

Judge *Powell* thought this reason of no weight, because he was of opinion, that a writ of error, in a judgment given in a superior court, does not indeed remove the record or plaint, but proceedings only; because *here* diminution may be alledged: but he was of opinion, that writs of error, of judgments in an inferior court, removed all; because *there* was no alledging of diminution. *Adjournatur. Vide post. Trin. 12 Ann.*

Hacket *versus* Glover. B. R.

WRIT of error, out of the court of Common Pleas, upon an action of covenant, wherein the plaintiff declares, that the defendant sold him goods for so much money, and covenanted to defend and warrant the goods to the plaintiff *contra omnes personas*; and assigns for breach of the covenant, that at the time of the sale, the defendant had neither the possession nor the property of the goods; to this the defendant demurs, and judgment for the plaintiff.

Covenant.

Breach well assigned.

Upon error brought, Sir *Peter King* insisted, that this was no breach of the covenant; for the intention and design of the covenant, was

Hilary Term 11 Ann.

was only to secure the possession; and therefore until an eviction, the covenant was not broken. *Co. Lit.* 365. a. it is said, that an eviction is of the very essence of a warranty; and though *Warrantia Chartæ* may be brought before eviction, it is only a charge upon the land. *Vide terms of Law. Fitzherbert* 134. b. Suppose a man having only an equitable interest in goods, sells those goods, and covenants that he is the owner of those goods, and will warrant and defend, &c. shall the vendee, in this case bring an action of covenant before eviction, and support it only by saying, that the property, viz. the legal title was in another at the time of the sale? *2 Saunders* 175. *Hobart* 51. *1 Rolle Rep.* 519. *Moore* 175. *Hobart* 34, 35. *Dyer* 328.

* P. 143.

Note, Most of the foregoing cases proved only, that a covenant for enjoyment against all interruption, extended only to legal interruption. *Quod concessum per curiam, sed nihil ad rem.*

Mr. *Lutwyche* argued on the other side, that since it was confessed by the demurrer, that he that sold them had neither the possession nor the property, the buyer could not take possession of them, without exposing himself to an action of *trover*.

The word *dimisi* in a lease, imports a covenant in law; and in such an action it had been enough to assign for breach, that the lessor had no title at the time of the lease, without shewing an eviction. *2 Cro.* 474. *3 Mod.* 261. *1 Siderf.* 178.

Parker Chief Justice: Plaintiff cannot use the goods without being liable to an action, which is a damage. If the case had been, that the defendant had had the equitable right, but another the legal one, it had been proper for you to have laid it before the court by pleading it.

Judge *Eyre*: Warranty, in the nature of it, imports as well warranty of the property as possession. *1 Rolle* 90. *Warner and Tallard*: the case upon the word *dimisi*, a strong case; for that a covenant in law; and if not necessary there to set forth eviction, a *fortiori* not *bere*. Judgment affirmed.

* P. 144.

* *Sheppherd and Maidstone.* B. R.

Debt upon bond.
Whether the breach assigned was a breach of the condition of the bond?

DEBT upon bond: upon *oyer* of the bond it appeared, that the condition was, 1st, That the defendant should perform all covenants comprized in such a deed of indenture. 2^{dly}, That he would upon request come to an account with the *East-India* company, for whatever of their goods should come to his hands, or the neat produce of them. 3^{dly}, That he would pay them whatever, upon such an account taken, he should be found in arrear to them.

Hilary Term 11 Ann.

In the deed of indenture referred to, it was covenanted, that the defendant should, within such a time, go for *Fort St. George*, and serve the company faithfully there, as a factor, for five years.

The breach assigned was, That so many *rupees* belonging to the company came to his hands, which *illicite & fraudulentem imbezilavit, & in proprium usum, &c. contra tenorem indenturæ, &c.*

Upon demurrer the question was, Whether the breach assigned was a breach of the condition of the bond?

Resolved by the court, that it was not; for the defendant was not barely intrusted with the custody of the company's goods, but was their factor; and as such, had a power to invest their money and goods in whatever he thought most for the advantage of the company, and was not to account for the goods themselves, but the neat produce of them: so that he might convert to his own use the stock that was the company's, provided he answered it to them out of his own.

Indeed in case of an apprentice, the case is different; for he has only the custody of his master's goods and * cash, and therefore * P. 145. the breach here assigned would have been a forfeiture of his indentures.

But Serjeant *Pingelly* being retained to speak to it, *Adjournatur.*

Parker and Langly. B. R.

THIS was an action upon the case for a malicious prosecution, wherein the plaintiff declares, that the defendant arrested him in the sum of 100*l.* on purpose to hold him to special bail, where not one penny was due: defendant demurs specially, and shews for cause of demurrer, that the plaintiff had not, in his declaration, shewn what became of this malicious prosecution.

See post. 209.
Case for malicious prosecution.
Declaration naught, for want of shewing what became of the malicious prosecution.

They that argued for the defendant owned, that after a verdict, judgment could not have been arrested for this defect in the declaration, because it could not be intended that the plaintiff could have had a verdict, unless it had appeared that the prosecution was malicious: but upon demurrer, and that a special one, it was insisted upon as a good exception.

No action will lie for a malicious indictment, without shewing what became of that indictment.

Cases quoted *arguendo*, were 2 *Rich.* 3. 9. *b.* *Salk.* 15. *Hobart* 205. *Keilway* 99. *b.* *Godbolt* 76. 1 *Saunders* 228, 229. 1 *Jones* 312. *Siderfin* 124. *Yelverton* 117. *Cro. Car.* 291.

Hilary Term 11 Ann.

The reason of all which cases is founded in this, that otherwise there might be a clashing of jurisdictions, and contrary verdicts: as here it is possible, that the defendant may be found guilty of a malicious prosecution; and it may afterwards be adjudged, in a proper place, that the prosecution was not malicious.

- * P. 146. * It was argued for the plaintiff, that this action was founded upon malice, and brought for holding to excessive bail, which was collateral to the prosecution, and therefore not to wait the event of *that*, which if they did, the statute of limitations might possibly bar them. *Styles* 451. 3 *Lev.* 210.

It was urged, that there was a difference between an action upon the case for a malicious prosecution, and an action of conspiracy: that in the latter, the plaintiff must indeed shew the former action to be determined; but then it appears from the register, *p.* 134. that this does not proceed from the nature of the action, but the frame of the writ; and this held to be the reason, 1 *Ventris* 12. 1 *Jones* 93. 9 *Co. Poulter's case.* *Cro. Jac.* 130.

Court inclined in favour of defendant. *Sed Adjournatur. Vide post. Hil. 12 Ann.*

Queen and Corporation of Durham. B. R.

Mandamus to
restore a
town-clerk.

THIS was a *mandamus* to restore *H.* to the office of town-clerk; and to the return two exceptions were taken:

1st, That they said, that such a year of Queen *Elizabeth*, and long before, they were a corporation; and so did not intitle themselves by prescription, which is ever time out of mind. 10 *Rep. Sutton Hospital.* 3 *Cro.* 168. 12 *Ed.* 4. *fo.* 8. *b.* 11 *Rep. Bag's case.* *Rastall's Entries* 3. *b.* *Dyer* 7.

2^{dly}, It was not returned, that the town-clerk was actually chosen annually, but only that he was *annuatim eligibilis*; whereas time and usage are necessary to prescription. 1 *Inst.* 110. 1 *Lev.* 262. 3 *Cro.* 110.

- * P. 147. * Besides, the office of town-clerk is, in the nature of it, in the eye of the law, an office for life; and will be so intended, until the contrary appear. 1 *Ventris* 82.

As to the 1st, The court were of opinion, that a corporation must either be by charter or prescription, which is ever time out of mind; and therefore the authorities were allowed for law: but yet the exception was disallowed; because it was only failing in a matter of surplusage.

But for the 2^d exception, the court held it good: for the office of town-clerk is an office for life; unless restrained by charter or pre-

Hilary Term 11 Ann.

prescription, which ought to be shewn upon the return; but this not done.

Besides, though he be *annuarim eligibilis*, he may continue town-clerk, and will do so until they choose another: but this does not appear to be done; the exception therefore good for both these reasons.

If the return had been *eligibilis pro uno anno tantum*, his office would have expired at the end of the year, whether they had chosen another or not; but otherwise, as this return is.

Merril and Josselyn. B. R.

WRIT of error out of the court of Common Pleas, where the action was debt upon a bond conditioned for payment of money upon the 25th of March. Defendant pleads payment upon the 20th; plaintiff replies that he did not pay it upon the 20th. Upon this issue joined, verdict for the plaintiff, and judgment accorded upon this error was brought.

Debt upon bond.

Pleading.

Solvit ante diem pleaded, issue joined, verdict for the plaintiff, yet judgment must be for the defendant.

* P. 148.

If the verdict had been found for the defendant, and judgment given accordingly, all had been right; for * payment upon the 20th, is payment upon the 21st, and so on: but now the verdict is found for the plaintiff, the issue is immaterial; for non-payment upon the 20th, can be no evidence of non-payment upon the 25th, for it might be paid in the mean time. 2 Cro. 434. Cro. Eliz. 828. Hill, nono Annæ, Mason and Price.

Parker, Chief Justice: It is hard that the defendant should take advantage of his own immaterial pleading: but we cannot help it; Hill and Manby, in court of Common Pleas, is a case in point.

Judgment reversed.

Jones and Gwynn. B. R.

See post. 214.

THIS was an action upon the case, for falsely and maliciously indicting a man, for using the trade of a bager, without a licence to do it.

See Salk. 15. Action upon the case for false and malicious indictment.

One exception to the declaration was, that the indictment was said to be *falso & maliciose*, and not *absque probabili causa*.

But resolved, that in case of an indictment, *falso & maliciose*, without *absque probabili causa* was enough: but had it been an action for a malicious prosecution, those words must have been in. 2 Cro. 193, 490. 2 Mod. 51. Jones 93, 94.

But

Hilary Term 11 Ann.

But another exception was taken by the court, that this was an action brought for an indictment for using, &c. and not being licensed; and yet the plaintiff does not shew, that he was licensed.

* P. 149. Then it was doubted, whether this were a matter indictable? and then the question would be, whether * an action would lie, for falsely and maliciously indicting a man for a matter not indictable, nor yet containing scandal?

And the court inclined to the opinion, that it would not; and that the law stood thus: 1st, That a false and malicious indictment, for a matter not indictable, yet containing scandal, was actionable. But,

Salk. 13. 2^{dly}, If it was neither indictable, nor scandalous, that it was not actionable. *Raymond* 135. 2 *Siderfin* 162. and the late case of *Savil and Roberts*.

3^{dly}, That if it were for a matter indictable, though it did not import scandal, it was actionable.

To this opinion of the court, it was objected by the counsel, that in the reason of the thing, they could not see, why its being for a matter indictable, or not indictable, should occasion such a difference; since a person by being falsely and maliciously indicted for a matter not indictable, is put to the same expence and trouble as if it were for a matter indictable; and the maliciousness of the prosecution rather more.

This way of reasoning the court allowed to have weight in it. See *Post*. 214.

Thornicraft and Barns. B. R.

Debt upon bond.

WRIT of error brought upon a judgment given in the court of Common Pleas, where the action was debt upon a bond of 1000*l.* penalty, conditioned, that if such a one being an apprentice, should purloin or imbezil any thing to his master's damage, that then he should make it good. Breach assigned was, that he did imbezil and purloin 200*l.* Upon this issue joined, verdict for the plaintiff, and judgment accordingly.

* P. 150.

* Now upon error brought it was insisted, that the breach was not well assigned; for the condition of the bond, tying it up to such purloining as should be to the damage of the master, the plaintiff in the original action should have averred, that this was a purloining to the damage of the master.

But

Hilary Term 11 Ann.

But the whole court thought the judgment of the court of Common pleas was well given; for the words *purloining* and *imbeziling*, are always taken in a bad sense, and *ex vi termini* import damage to the master; and what appears plainly needs not be averred, according to that maxim of law, *Quod constat clare non debet verificari*. Judgment affirmed *nisi*.

Purloin and imbezil are always understood in a bad sense. Maxim.

Queen and Inhabitants of Hornsey. B. R.

PARKER Chief Justice: If a vill be erected, and a way laid out to it, if there be no other way but *that* to the vill, not material *quo animo* it was laid out, it shall be deemed a publick way.

Stra. 182. Publick way.

No one living in a hundred shall be allowed an evidence for any matter in favour of that hundred, though so poor as upon that account to be excused from the payment of taxes, because though poor at present, he may become rich.

Evidence.

* Easter Term

* P. 151.

12 Annæ. B. R.

Corporation of the Town of Bewdley.

THOSE that produce an evidence ought to examine him in Chief only: but they, *against whom* he is brought, may examine him upon a *voir dire*, if they please, whether he is concerned in interest.

Evidence. Salk. 594. 11 Mod. 100. 115.

The matter in issue was, Which was the charter by which the corporation of the town of *Bewdley* was to act, whether by the ancient one, or one of later date?

Now an evidence being brought to establish the ancient charter, his evidence was excepted against, as being a mortgagee under the old corporation, which they proved by an answer of his to a bill in Chancery. But this answer being so uncertainly penned, as that it might be true, and yet his mortgage of such a nature as not to prevent his evidence, it was insisted that he might be called to explain the ambiguity of his answer.

VOL. X.

D d

And

Easter Term 12 Ann.

And the court was of opinion he might, since his answer depended upon his veracity, as much as the evidence he could then give; and if the one be to be credited, why not the other?

* P. 152.

* But afterwards his evidence was rejected upon another consideration, *viz.* That in his answer he lays the whole stress of his defence upon the matter then in issue, *viz.* the subsisting of the present corporation.

Queen and Ridpath. B. R.

Stra. 968.

Fort. 358.

Recognizance
ad responden-
dum general-
ly, the nature
of it.

A Recognizance was entered into by *Ridpath*, with securities, whereby he was bound to appear the first day of the term *ad respondendum*, &c. (in the mean time to his good behaviour) and not to depart without the licence of the court.

An information is preferred against him by the Attorney General; to which information, by reason of some defect in the pleading, the Attorney General thought fit to enter a *nolle prosequi*, and then the Attorney General exhibits another.

It was insisted in favour of *Ridpath* and his securities; 1. That the words *ad respondendum* must be extended to those crimes only, the suspicion of which was the cause of his commitment and entring into the recognizance, and not to the crimes he should afterwards commit, or be charged with; for then it would be utterly impossible for a man to get any body to be bound in a recognizance with him; an opinion of the innocence of the person as to the crime charged, being probably the only motive that can be sufficient to induce men to become bound for others.

2. That *ad respondendum* refers to the first day of the term, when he was bound to appear.

3. That the entring of a *nolle prosequi* was a bar to the offence contained in the information; at least, that it was a discharge from any further prosecution for it: and that it was all one, whether he was discharged from the recognizance, by rule of court made for that purpose; * or by a judgment, that by a necessary consequence amounted to a discharge.

* P. 153.

But the court were of opinion, that the recognizance extended to all crimes whatever he should be charged with; and that if it had relation to any particular crime only, it must be mentioned in the recognizance: but *that* is only *ad respondendum* generally.

That there was no such inconvenience as was pretended; the bail in this case being bound in a sum certain, and not to stand in the place of the principal, as in civil cases: that the person's not appearing according to his recognizance, his absence (be the cause or reason of it what it will) was the cause of the forfeiture of the recognizance.

That

Easter Term 12 Ann.

That anciently in special bail in civil actions, where the bail is Bail. to stand in the place of the principal, bail to one action was to stand bail to all actions that he should be charged with when in court. That this was hard in case of special bail, and is therefore now altered, though altered only by rule of court; and that as to common bail the law is still the same.

That the *nolle prosequi* was neither a bar nor discharge.

Salk. 21.

Turner and Goodwin. B. R.

See 12 Ann.

189, 222.

Post. 189.

Fort. 145.

Debt upon

bond, condi-

tioned to pay

THIS was an action of debt upon a bond for 3000*l.* conditioned for the payment of 1500*l.*

so much money, the plaintiff assigning over to the defendant such a judgment. Defendant pleads, plaintiff had not assigned. Plaintiff replies, that he was ready to assign. Judgment pro quer. for said, that payment of the money, and assignment of the judgment, were concomitant acts; and therefore the defendant could not excuse himself merely upon the neglect of the plaintiff, but ought to have pleaded tender of this money; though he was not bound to have paid the money, in consequence of that tender, unless the judgment was at the same time assigned over to him.

The condition of the bond recites, that whereas *Dibble* was indebted to *Turner* in a bond of 3000*l.* conditioned for the payment of 1500*l.* and had recovered judgment for this money; *Goodwin* upon consideration that the plaintiff would forbear suing out execution upon *Dibble*, promised to pay the money to *Turner* upon request, * he assigning over to him the judgment he had against * P. 154. *Dibble*.

Defendant pleads in bar, that the plaintiff had not assigned the judgment: plaintiff replies, that he was ready to assign.

Defendant demurs, and plaintiff joins in demurrer.

It was argued for the defendant, that those words *assigning over the judgment*, was in nature of a precedent condition. 1st, Because otherwise the defendant would be without remedy, viz. any remedy at law for the assignment of his judgment, the obligee only being able to sue upon this bond. But on the other hand, no inconvenience to the plaintiff, in interpreting this a precedent condition, because he can put the bond in suit for his money.

2^{dly}, Supposing the words might with an equal probability admit of either interpretation, considered simply in their own nature, yet being the words of the condition of a bond, which is always in ease and favour of the obligor, they must upon that account be interpreted here a precedent condition. 1 *Lutwyche* 490, 596. 1 *Ventris* 147. covenant to pay so much money, the plaintiff making to the defendant such an estate in such land, and declared *licet paratus*, &c. he had not paid the money: defendant pleads, plaintiff had not made such an estate. Upon demurrer, judgment for defendant; *this* being resolved to be a precedent condition.

Dubious

words in the

condition of a

bond to be

understood in

the most fa-

vourable sense

for the obli-

gor.

The

Easter Term 12 Ann.

The court were divided in their opinion: *Parker* and *Powys* for the plaintiff, and *Eyre* for the defendant.

The two former were of opinion, that the single question was, * P. 155. who was to do the first act? and that the * obligor was to do it; for though the obligor be not bound to part with the money unless the judgment be at the same instance of time assigned to him, yet he is bound to seek out the obligee, bring the money, and tell him, Sir, here is your money, if you will assign the judgment.

Eyre was for the defendant; being of opinion, that the words *assigning the judgment*, did amount to a precedent condition. 1st, Because the form of speaking, *yielding, paying, &c.* did always import so, unless the nature of the thing spoke the contrary. And 2^{dly}, Because if the judgment was assigned first, the bond might be put in suit for the money; but if the bond was paid first, there lay no remedy at law for the judgment.

Queen and Bradley. B. R.

Indictment.
Conviction of
a baker.

THIS was a conviction upon the statute 8 *Anna*, about the assize of bread.

There were two questions in the case: the first was, whether the crime was certainly enough charged in the indictment upon the defendant? the second, whether the same person could be both informer and witness?

The crime was thus charged, that the bread wanting so much weight of, &c. was bought in the shop of *Bradley*, a common baker.

And the court were of opinion, that the crime was not certainly enough charged; for the whole charge may be true, and yet the defendant innocent; for it is possible that it might be the bread of another person, sold in the defendant's shop; that therefore he * P. 156. ought to * have been charged *directly* with the sale of so much bread.

It is true indeed, that when a servant sells it in his master's shop, it is good evidence of its being the master's bread: but it is still but evidence; and it is a constant rule, that *that* which is but evidence, cannot be laid in an indictment.

Rule in in-
dictments.

Same person
cannot be in-
former and
witness.

As to the second point, the court seemed to be of opinion, that the same person could not be both informer and witness. For as to the objection, that this would render convictions impossible, unless persons were so fortunate as to have witnesses with them, there was nothing in it; for an informer is only nominal, and any body's name may be made use of.

Easter Term 12 Ann.

Manners *and* Pern. B. R.

THIS was the cause in which the university of *Cambridge* had the last term claimed conusance of pleas. And now the plaintiff moved the court, that the defendant might pay all the costs, for all the motions about that conusance. Costs.
See ante 125.
Fort. 155.

It was said, that when a defendant makes default at *Nisi prius*, he is from that moment out of court, and his motion in arrest of judgment is but as *amicus curiae*? and yet the plaintiff has always costs.

But the court rejected the motion; for they knew no precedent, nor saw any reason, that because a third person claimed conusance of pleas and is refused, that therefore the defendant should pay the plaintiff costs.

Besides, in this case the defendant by imparling, had as far as lay in him, shewn himself desirous of having the cause tried in this court.

Add to all this, that the motion was by no means without foundation; for the university only came a moment to late.

* Queen *and* Inhabitants of Gruelthorp. B. R. * P. 157.

THIS was an action upon the statute of *Westminster 2. cap. 46.* which enacts, that if any upon just *approvement* do make a hedge and ditch for that purpose, and it is thrown down afterwards by some that cannot be discovered, by verdict of the assize or jury, and the towns adjoining will not indict such as are guilty of the fact; in such case the said towns shall be distrained to make again such hedge or ditch at their own costs, and shall also yield damages. Fences.
Action upon
stat. Westm. 2.
c. 46.

It was urged by the defendant, that the present proceedings upon this statute were much too quick; it being in all, not above three weeks since the crime committed.

The statute gives this action conditionally, *viz.* if the inhabitants do not indict the persons guilty of the offence; and therefore some time must be allowed for notifying the offence, some time for inquiring who the offenders are. Lord Coke, 2 *Inst.* 406. allows the inhabitants a year and a day's time for indicting the offenders. 1 *Rolle's Rep.* 365. the same objection taken. And all the precedents are, at least, a year's time subsequent to the offence.

The court were of opinion, that the time was too short; and that the statute supposes a reasonable time ought to be allowed for indicting.

VOL. X.

E c

If

Easter Term 12 Ann.

If for a robbery committed in the day-time, the hundred is not chargeable until forty days after the offence, certainly less time must not be allowed here, where the offence is committed in the night-time.

In this case, an objection was taken to the defendant's plea; for
 * P. 158. this statute not extending to every * lord, but such lord only as had right to approve, the defendants to shew the lord had no right to approve, pleaded a prescription to common thus, that *divers* freeholders had a right to common, without confining their prescription to any certain particular tenements. It was admitted by way of custom this general way of pleading had been good, but not by way of prescription. And to this opinion the court inclined. *Adjournatur.*

* Sale. * Sail and Kitchingham. B. R.

Action of covenant. **A**CTION of covenant, and several breaches assigned; but that covenant, upon which most stress was laid, was, that the lessee should lime and dung the land *durante termino*, which was six years.

This action was brought by the plaintiff as heir at law to the lessor, and the breach of the covenant was thus assigned, that after the descent of the land, he did not *durante termino*, lime and dung the land.

It was objected by the defendant, 1st, That covenant is a personal action, and that therefore the executors were the proper persons to have brought this action; though they indeed, upon their recovering, shall be trustees for the heir at law.

Where covenants relate to land, they run with it, attend upon the reversion, and the heir may bring the action. But the court were of opinion, that this was a covenant relating to the land, and for the advantage of the reversion: that it would have gone to an assignee without his being named in the covenant, which proves it to be a covenant that runs with the land, and attends upon the reversion; and by consequence a covenant to which the heir at law will be intitled, as he is to the reversion.

Breach not well assigned. 2^{dly}, It was objected by the defendant, that the breach was not well assigned; because the not dunging it and liming it since the descent, is no breach of the covenant, * if it was limed and dunged so sufficiently before that it did not need it. And of this opinion was the court. *Adjournatur.*

* P. 159.

Inhabitants

Easter Term 12 Ann.

Inhabitants of Westham in Essex. B. R.

THE court was moved to quash an order made by the commissioners of sewers, charging the inhabitants of *Westham* in *Essex*, for erecting of a tumbling bay (to prevent an inconvenience occasioned by *Conden* lock, which in the very order is said to have been erected for a private benefit) and of a lock, to prevent the damage the tumbling bay would occasion to the navigation.

Commissioners of sewers, their power.

The court was of opinion, that the order could not be maintained, because it was out of the power of commissioners of sewers to charge inhabitants for finding an expedient, how a thing erected for a private benefit may be continued, and yet be no nuisance; their business should have been to have abated the nuisance.

Commissioners of sewers have no power to make a river navigable; nor even to improve the navigation of a river, beyond what it was before. Preserve it they may in the state it was, by removing obstructions, and other *natural* ways; but they cannot even help the navigation by erecting locks, or any such *artificial* methods.

* Trinity Term

* P. 160.

12 Annæ. B. R.

Miles and Williams.

See 13 Ann. 243.

DEBT upon bond brought against the defendant and his wife: they plead in bar, that the bond was entered into by the wife *dum sola*; that a commission of bankruptcy issued out against the husband, who in all points conformed himself to the statute about bankrupts in the 4th year of the queen; and so both defendants say, that by virtue of the statute of the 4th of the Queen, and other statutes, he became a bankrupt, *per quod* the debt was discharged, *et hoc parati sunt verificare*.

Bankruptcy. Debt upon bond, brought against man and his wife: they plead a discharge by the bankruptcy of the husband, and conclude *hoc parati sunt verificare*.

Special demurrer. Court of opinion, that the bond was discharged per bankruptcy of the husband; but being also of opinion that they ought to have concluded their plea to the country, and this being one of the causes assigned for demurrer, plaintiff had his judgment.

To

Trinity Term 12 Ann.

To this plea plaintiff demurs specially.

1st, Because a bond entered into by the wife, *dum sola fuit*, is not discharged by the bankruptcy of the husband.

2^{dly}, Because they ought to have concluded their plea to the country.

* P. 161.

More cases
quoted in the
argument.

43 Ed. 3. 95.

Fitzherbert

Abr. 1211. C.

120.

The case of

Drue and

Horn, report-

ed in Allen.

Hil. 6 Ann.

Ludlam and

Brownhill.

* It was argued in favour of the plaintiff by Mr. Salkeld, that, at the common law, no persons were allowed to avoid actions, by pleading disability in themselves. *Cro. Eliz.* 516. 4 *Co. Rep.* 123. *Beverley's case.*

That properly speaking, no man can be said to be a debtor, but *ex suo contractu.*

It is not pretended, that an executor would be excused and discharged, by this statute, of all debts he stands charged with as executor; and yet the executor as properly a debtor as the husband in this case, marriage not at all altering the nature of the contract; for it was not in the power of the wife, by any act of hers, to dissolve her own contract; nor could the husband, for he is a third person. This indeed the husband can do, he can make himself liable; and this he has done *ratione connubii*; but this hinders not, but that the wife may still remain chargeable, *ratione contractus.*

If the husband die, his executor not chargeable with this debt; and if the wife dies, husband not liable, which plainly shews it to be properly the debt of the wife.

In *Hobart* 184. it is resolved, that a debt of the husband and a debt of the wife cannot be joined in one action brought against husband and wife; which certainly they might, if so be that after coverture the debt of the wife was, in a strict and proper sense, the debt of the husband.

1 *Levinz* 17. *A. and B.* obligees, one of them becomes a bankrupt; resolved, that this debt was not assignable. If this bond had been made to husband and wife, it had reached the equity of the present case; for it seems plainly against equity, that a debt due from the wife should be discharged by the bankruptcy of the husband; and yet that the creditors of the husband cannot have the benefit of debts due to the wife.

* P. 162.

* And though chattels personal cannot remain in jointure after marriage; yet *choses in action* may. The husband cannot sue alone upon a bond given to the wife *dum sola*, which proves it a debt still due to the wife.

As the nature of the contract is not altered by the marriage, but only the power of the wife suspended; so neither is the nature of the contract altered by bringing of the action.

But, indeed, after judgment, *transit in rem judicatam*; and it is the judgment that gives the husband a new right, and will make it go to his executors.——But surely this court will never esteem an act of bankruptcy of equal force with a judgment.

Trinity Term 12 Ann.

The plea ought to cover the wife as well as the husband; but the wife is not a bankrupt, because the husband is so; for by the law ^{Maxim of} of England, the wife shall share in the honours and advantages, but ^{law.} not in the *pœnis & criminibus* of her husband.

A man covenants not to sue husband and wife, upon a bond entered into by the wife *dum sola*, during the life of the husband; afterwards, contrary to this agreement, he puts the bond in suit; this covenant cannot be pleaded in bar, but must be pleaded in abatement only.

It was further insisted upon, That no plea could be good for the husband and wife, but such a plea as would have been good for the wife had she remained unmarried.

Mr. Fortescue *pro def* insisted, That what was due to the wife was in the strictest sense a debt belonging to the husband; for the very definition of a debt, according to *Bracton, lib. 3. cap. 1.* is what a man can recover by action, and that to his own use. The last part of the definition was what he chiefly relied upon, as that which distinguished it from the case of *Levinz* 17. about the joint obligees; and also from the case of an executor, who * *sues jure re-* * ^{Argument for defendant. Cases quoted, Noy 142, 505. 2 Keble 331. 1 Chancery Rep. 71.} *presentationis, in alieno jure*; and recovers not for himself, but for another's use. ^{P. 163.}

In *Calvin's Lexicon*, a debtor is defined to be one that may be sued against his will; and so may the husband.

Against an executor who is sued as such, the action must be in the *detinet* only; for the word *debet* would not be true, since he is not sued for his own debt, but the testator's; whereas an action brought against husband and wife must be in the *debet* and *detinet*, which shews, that the law of England, upon marriage, considers the debts of the wife as the debts of the husband. 20 H. 6. 22. 9 Edw. 4. 24.

In this case no remedy is to be had against the wife: she cannot be taken in execution; and therefore the husband, who alone is liable to execution, is debtor.

A Release by the husband in case of a debt to the wife would be a release in his own right; whereas an executor releases *in alieno jure*. *Hales's Analysis of the Law*, page 47.

So when the husband sues, he sues in his own right, derived to him from the marriage. 47 Ed. 3. 23.

It is true, that a debt due upon a bond made to the wife *dum sola*, will (unless recovered by the husband) *survive* to the wife: but from thence it necessarily follows, that this must have been a debt vested in the husband at the time of his death, according to the rule among join-tenants, that nothing accrues to the survivor, but what was in jointure at the time of the death of his companion. *Nihil* ^{Maxim of} *accrescit ei, qui nihil habuit in re unde accresceret jus.* If now a ^{law.} debt due to the wife *dum sola*, does vest in, that is, become due to

Trinity Term 12 Ann.

the husband. by a parity of reason a debt due from the wife *dum sola*, ought to be esteemed a debt from the husband, that is, a debt of the husband's. Nor is it any objection against its being esteemed his debt, that he is chargeable with it during his life only; for as a feoffment made by tenant in tail creates a fee-simple, though it is possible the fee-simple may * last but an hour; so though the husband is only chargeable with this debt during his life, yet as long as he lives it is his debt.

27 H. 6. 9. *Choses in action* are assignable. By *stat. 1 Jacobi*, debts for the benefit of the bankrupt are assignable.

Then it was argued, that there was no inconvenience in making the debts due to the wife assignable; for this is no harm to the wife, since she knew that the husband had power to receive or assign her interest. 1 Cro. 187. 1 Ventris 10. 1 Keble 167. But great inconvenience of the other side, by enabling the bankrupt to shelter all his estate (by assigning it) in the name of his wife, and so putting it out of the power of the commissioners of bankruptcy. Suppose in case of such an assignment the bankrupt will not, (because it is not for his interest) and the assignees of the commissioners can not sue, What becomes of the estate in the mean time?

If then debts due to the wife are, as well as other debts due to the husband, assignable to the commissioners, common equity requires that debts due from the wife should be discharged by the statute of bankruptcy, as well as those that are due only from the husband.

This construction even advantageous to the plaintiff, by preventing him from suing a bankrupt, one that he can get nothing by, unless he be a felon, which is not to be supposed.

It is something strange that a man should be both a bankrupt and not a bankrupt at the same time; a bankrupt as to his own estate, but not his wife's.

It was observed from the clause in the act, whereby it is criminal for bankrupts to conceal monies or effects, whereof any person in trust for them stands possessed, that it is plain that the bankrupt is bound to discover a bond entered into to the wife *dum sola*; and if he is bound to discover, then it must be assignable; * and consequently,

* P. 165. by parity of reason, a bond debt from the wife *dum sola*, must be discharged.

Reply for plaintiff.

The case of the release not to the purpose; for it must be a release of all *demands*; and *that* will release the debt to the wife, because the husband only could demand it: but a release of all *actions* would not release it. 21 H. 7. 29. b.

Noy 6. Bond given to a feme sole, not forfeited by the outlawry of the husband.

As to the case of a bond given to a feme sole, who marries, and her husband dies; it is an improper expression to say the bond *survives* to the wife, it does indeed *remain* to her.

It

Trinity Term 12 Ann.

It is true, that debts in trust for the bankrupt are assignable: but surely, it does not from thence follow, that a bond entered into, to the wife *dum sola*, is so; for such a debt can never be said, in the original or creation of it, to be a debt in trust for the husband. And if such a bond is not discoverable, it is not assignable, and by parity of reason this debt not discharged.

As to the inconvenience pretended, that this would open a way to shelter an estate under the wife's name; the answer is easy, that *that* can never be done without fraud, which will vitiate the whole contrivance.

Sir Thomas Powys lately a Judge of B. R. desired the next time this case was spoken to, it should be more distinctly argued, whether upon supposal that a bond made to the wife *dum sola*, was assignable to the commissioners, it did necessarily follow that the bankruptcy of the husband would discharge a bond given by the wife *dum sola*? See *Post*. 243.

* + Grosvenor and Stephens. B. R.

* P. 166.

† Gravenor.

THIS was a writ of error; and an error in *fact* was assigned, *viz.* That the plaintiff was a feme covert at the time of the action brought; *sed non allocatur*; because it might have been pleaded in abatement. And it is a general rule not to suffer *that* to be assigned for error in fact, which might have been taken advantage of, by being pleaded in abatement.

Writ of error.

Weltale and Glover. B. R.

ACTION of debt upon a bond, release pleaded; plaintiff replies, that the release was not by deed, *et de hoc ponit se super patriam*. Debt upon bond.

Defendant demurs specially, because he ought not to have concluded, *et de hoc ponit se super patriam*, but *et hoc petit quod inquiretur per patriam*. Pleading. Joinder in demurrer.

Mr. Dee argued for the defendant, that though indeed both forms of speech bore the same sense, yet that the form of entries was always so: *et de hoc ponit*, &c. was the conclusion of the defendant his bar, *et hoc petit*, &c. of the plaintiff's replication. That known and received forms were to be observed; and that to depart or vary from them, was an obstinacy not to be encouraged, particularly when specially demurred to. 8 H. 6. 19. it is said, that every plea must have its proper conclusion. *Plowd. Com. fol. 66.* (Dyve and Manningham) says, That after pleading the special matter, the conclusion

Trinity Term 12 Ann.

clution of the plea must be, *& sic non est factum*; which can be only for form sake, for the matter of special pleading, shews the bond to be void without the conclusion. *Dyer* 143. 2^d deliverance, *& de tali statu suo obiit inde seifitus*, a form always observed; and therefore the words *de tali statu suo* being omitted, though other words of the same * import were put in, yet held naught, and ordered to be amended. And if forms of law unsupported by any necessity, nor founded in the reason of the thing, are to be strictly adhered to, the plaintiff ought not to be allowed the liberty of varying the received and known conclusion of his plea; though he has used expressions, it must be owned, equivalent in sense.

* P. 167.

Mr. *Agar* argued for the plaintiff, that this way of pleading occasioned no inconvenience or alteration of law; and that the law does not always tie up men to any certain forms, provided they use other words as proper.

When the plea is the negative, as the plaintiff's replication here was, *et de hoc ponit*, &c. a more proper conclusion, than *et hoc petit* &c. for a negative is not to be proved. And the reason why most commonly the plaintiff concludes one way, and the defendant another, may perhaps be thus accounted for, that most of the general pleas being in the negative, it were somewhat absurd, for a man that concludes his plea in the negative, to desire that his plea may be inquired of *per patriam*.

He confessed, that the general course of entries were against him; and that *Co. Lit.* 126. says it is so, but not that it must be so. Then he quoted *Rastall's Entries*, 20. b. 36, 324, 500, 616. b. 633. 1 *Levinz* 281. where the precedents were all with him.

Parker Chief Justice: The difference taken by Mr. *Agar*, between negative and affirmative pleas, seems to me very reasonable. And I think it highly probable, that the original reason, why the entry for the defendant has been *et de hoc ponit*, &c. and that for the plaintiff *et hoc petit*, &c. might be, that for the most part general issues are in the negative, and replications in the affirmative.

* P. 168. The question is not which way the stream and current of precedents run, for that Mr. *Agar* gives up, and he * must do so; but whether it be a form*so necessary, that a small variation (and that not in sense) from it, will be erroneous; and, upon a special demurrer, prevent the plaintiff's having his judgment. And not one authority has been cited to prove this.

Mr. *Agar* has mentioned four or five precedents, not to overthrow or alter the general form of precedents, but only to prove, that this form of words is not essentially necessary.

Besides, it is to be considered, that these words now objected to, are legal words, not fanciful words of the party's own invention. For the writ of *venire* recites of both parties, *quod posuerunt se super patriam*;

Trinity Term 12 Ann.

patriam; and then the entry, *prædictus similiter* the plaintiff, &c. imports that he too *ponit se super patriam*; the very words here objected to, as improper for the plaintiff. So again, when the plaintiff concludes, *et hoc petit quod inquadratur per patriam*, &c. the entry is, *et prædictus defendens similiter*, &c. viz. *hoc petit*, &c. from whence it manifestly appears, that neither of these expressions are improper for either of the parties to use.

The rest of the Judges being of the same opinion, judgment *nisi, pro quer.*

Skinner and Newton. B. R.

THIS case was again spoken to this term, and it was insisted, See ante 140. that the declaration was naught, by reason of the words *tres pecias terræ* used instead of *clausum*.

It was observed, that there were several distinct species of actions of trespass, viz. *quare domum fregit*, where trespass in houses; *quare clausum*, where in land; *quare parcam*, when in parks; *quare piscariam*, &c. when in fisheries.

* Might it not now be said, that *terram fregit* would do for any * P. 169. of these? for a grant of the land passes fishery, house, &c. No, by no means; for if that might be allowed, the various species of actions of trespass would be all confounded.

The word *clausum* imports possession, but so does not the word *pecia*. And from *Yelverton* 224. it appears, that there must be words, setting forth the possession of the plaintiff, by a necessary and not an argumentative implication.

Rol. Abr. tit. Indict. 80. same rule laid down in forcible entries.

That the word *clausum* imports possession, appears from the definition of the word in *Du Fresne's Glossary*. Somner in his *Saxon dictionary*, the best of the kind, says, that the expression *clausum fregit* is very ancient, and synonymous to our *English* word hedge-breaking; the law making the enclosure. 26 H. 7. 14. trespass in a common where all is open, must yet be *clausum fregit*. So is 2 *Lutwyche* 1344.

This way of declaration will serve for a highway, to which every body has a right. Where a man has a grant only of the herbage or vesture, he must declare *clausum*, &c.

1 *Rol. 334.* the word *tenementum* in forcible entries held bad for the uncertainty; and so is 2 *Rol. Abr. 80.* In 2 *Keble* 358. the word *curtilagium*, though more certain than *tenementum*, yet held bad in an indictment for trespass. *Carucatum terræ fregit* bad for uncertainty, *pecca terræ* bad in an ejectment. *Moore* 422. 2 *Ventris* 174.

This is a formed writ in the register, and therefore exactly to be complied with.

Trinity Term 12 Ann.

If it be said, this ought to be pleaded in abatement; it may be answered, that by 1 Roll. 176. it appears that this may be taken advantage of in arrest of judgment. And 1 Rolle's Rep. 2. this difference taken, that where it appears to the court from the writ itself, that it * ought to abate, *there* the court *ex officio* ought to give judgment against the plaintiff, though the defendant does not plead it in abatement; otherwise, *where* this does not appear in the writ.

For defendant in error it was argued, that the word *clausum* does not, *ex vi termini*, import possession, without the addition of the word *ipsius* the plaintiff. That the only question was, whether there was certainty enough, in the description of this trespass, for the defendant to plead the recovery in this action of trespass, in bar of another action brought for the same trespass. And it appears from the declaration, that for this purpose there is certainty enough. The end of the declaration in trespass is, to describe the trespass so certainly that the defendant may know how to answer.

Judge Eyre: It is indeed a barbarous expression; but if *gardinum fregit* be good and in the register, and also *boscum fregit*, why may not *terram fregit* be good too? the word *terra* in legal process, must be understood of arable ground: though in way of grant, it may signify any thing. And if it be *terram* of the plaintiff, it is *clausum* of the plaintiff; for the law makes the inclosure. Besides, the defendant after pleading to it, cannot take advantage of it in error.

But notwithstanding (*ut audiui*) in term Trin. 13 Ann. Judgment was reversed *nisi*.

* Nurton.

* Nutton and Crow. B. R.

Executor.
Indebitatus
assumpsit.

THIS was an *indebitatus assumpsit* upon three promises, brought by the plaintiff as executor to B. As to the two first promises, the declaration stood thus, that Crow the 22d of Jan. 1708. *in vita testatoris* being indebted, &c. and upon the defendant's craving *oyer* of the letters *testamentary*, a probate is recited as made four months before the time of the promises.

* P. 171. * The third promise was a promise to the executor himself, upon the stating the accounts, between the executor and defendant, touching *only* the dealings between the testator and him.

The plaintiff entered a *remittitur damna* upon the two first promises given, and obtained judgment upon the third in the court of Common Pleas.

Upon error brought, two things were chiefly insisted upon, *viz.* 1st, That it appeared of the plaintiff's own shewing, that this will

was

Trinity Term 12 Ann.

was proved in the life-time of the testator, and so was a void probate. And it was said, that this was an objection that went to all the three promises; and therefore was not helped by the *remittitur*; for a void probate is no probate at all; and though an executor may release before a probate, yet he cannot bring an action. 9 Co. 38. Co. Lit. 292. b. Plowd. Com. 203. 1 Roll. Abr. 917.

Sed non allocatur: for as natural to say, that the time alledged for making the promises was mistaken, and then the probate may be good; as to say, *vice versa*, the promises were well set forth, and the probate void; especially when the party has by entering a *remittitur*, yielded the promises to be naught.

The 2d objection to the judgment was, that here were promises made to the testator, and a promise made to the executor, all joined in one action, which ought not to be.

It was owned, that there is a difference taken 2 Lev. 228. between actions brought *by*, and actions brought *against* an executor or administrator. That an executor might join in one action, a debt owed him in his own right, and a debt owed him as executor; but an executor could not be sued in one and the same action, for a debt due from him as executor, and a debt due from him on his own account. And the reason assigned for this difference, is, that in the first case the judgment remains * still the same, notwithstanding the joining the two debts; whereas in the other, the judgment must be different, *viz.* in the one case *de bonis testatoris*, and in the other *de bonis propriis*. * P. 172.

But then it was said, by way of answer to this case, that the reason given to support the difference had no weight. For though indeed, in the first case, the judgment must be the same, yet the effect of that judgment is very different; for the one debt is recovered to his own use, the other debt, when recovered, will be assets. And then Cro. Car. 227. Shower's Rep. 366. Cook and Rogers, contradict this case.

A case in Hobart 88. was owned a strong case against them; but they endeavoured to oppose it by other authorities, as Hutton 27. 2 Lev. 110. and it was strongly insisted upon, that the nature of the action was changed, at least a new remedy given, by the taking of this account.

For the defendant in error it was urged, that actions upon the case came in the place of actions of debt upon simple contract, and were introduced merely to avoid the defendant his waging his law; and therefore both sorts of actions *were* to be governed by the same reason, and the same rules.

That the nature of the action was not changed by the account, appears from the nature of the thing; for the debt after the account,

as

Trinity Term 12 Ann.

as well as before, is due to him *jure representationis*, 26 H. 6. 4 & 5. 9 H. 6. 11. It was said, that the law had a great regard to the original of a debt. *Cro. Eliz.* 326. *Saule* 130. 2 *Gro.* 545. 1 *Law.* 893. all of them authorities, wherein resolved, that from a consideration had to the first rise and original of the debt, the action must be brought in the *debetur*. *Lane* 79. *Hobart* 88. strongly relied upon.

* P. 173. The court were of opinion, that the promises might very well be joined in one action: that the taking of the * account did not at all vary the nature of the debt: that the plaintiff lay under a necessity, to introduce the cause of action, of naming himself executor: that the pleading being here the same, judgment the same, and the effect of the judgment the same, as it would have been in separate actions, there could be no reason given for dividing them, but multiplying actions, which the law abhors; and against *Magna Charta*, *nulli negabimus nulli differemus*, &c. *Hobart* 88. held to be a strong authority for the defendant in error.

An executor may not be sued in one and the same action for debts due from the testator and himself, because the judgment is different. *Adjouratur*.

Queen and Corporation of Buckingham. B. R.

Mandamus.
Sec 178.

THIS was a *mandamus* to the corporation of *Buckingham*, to restore one *Muscot* to the office of a common burghers of that corporation.

Stat 13 Car. 2. The return in substance was, that *Muscot de facto fuit electus*; but that he not having received the sacrament within a year before his election, according to the act of 13 Car. 2. his election was void.

It was argued by Mr. *Leechmere* against the return.

The very foundation of a *mandamus* to restore, is the wrongful turning a man out, of at least a possessory right to a franchise; and therefore properly, and in its own nature it is a writ of restitution. And accordingly in the *Analysis of the Law*, now published from a manuscript of Judge *Hale's*, it is expressly called a writ of restitution; which, *ex vi termini*, imports possession.

* P. 174. Not necessary for one that has a possessory right to a franchise, to have a legal title to it. This is in its * own nature a freehold; and because it is *juris publici*, the law has a greater regard to the possession of such a freehold than to any of a private nature. If upon a presentment without title, institution and induction follow, the party

Trinity Term 12 Ann.

party has such a possessory right as he shall not lose without a *quare impedit*.

The *debite admissus* according to the constitution of the borough being not at all answered by the return, must now be looked upon as true; and for the same reason, it must now be taken for granted, that he has been guilty of no misbehaviour since his election.

The admission, not the election, makes the officer; and though the statute says the election shall be void, it says nothing of the admission.

There are various returns made to *mandamus*'s to restore. *Non fuit amotus*, is the most common return; and this return goes to the very foundation of the writ. *Non fuit admissus*, a good return: amotion depends upon the admission; and therefore *non fuit admissus*, is but a special *non fuit amotus*, *Hill. 11 Will. 3. King and Town of Cambridge*, *mandamus* to admit Love and others. A return of any subsequent incapacity, a good return. Confessing the amotion and justifying a very common sort of return.

1 Lev. 162.

He observed, That in all these returns the election was not answered; from whence it follows, that it is not a necessary and essential part of the writ. In *James Smith's* case, just after the revolution, the election was answered; but then it was answered in such a manner, as plainly shews it not necessary to be answered. Besides, the argument does by no means hold, that because it was to be found in some returns, that they had answered the election, therefore it is a necessary part of the writ; but the argument holds strong the other way, that because it is often not answered, therefore no necessary part of the writ. He observed, that unless the reason returned for not restoring him was a good reason for their turning him out, it was not a good reason.

4 Mod. 52.

* He affirmed, that a corporation, after their admission of him * P. 175. as duly elected, had no power or authority to call in question the title of him, or the rest of their members; and that it must by no means pass for granted, that they may disfranchise a man for every cause for which he may be proceeded against upon a *quo warranto*; because there is this great difference between proceedings by *quo warranto*'s, and the turning a man out; that in the former case, the man remains in possession of his franchise during the time the right is in dispute; whereas in the other, the man is all the while out of possession; which is a wrong, that restoring him afterwards does not make him sufficient amends for. *James Bagge's* case in *Co. Rep.* is a leading case as to *mandamus*'s, and this was a *mandamus* to restore; and there it was laid down, that a disfranchisement ought to be founded upon some act done against the duty of a burgess.

11 Co. 93.

A power of disfranchisement is not a power incident to a corporation, and what the court can *ex officio* take notice of; but it must be given by express words in the charter, and pleaded, which here it is not.

Trinity Term 12 Ann.

If corporations have a power to judge of elections, they must necessarily judge of acts of parliament concerning them, they must judge the right of electors, &c. a jurisdiction too great to be supposed vested in a corporation.

It seems absurd for a corporation to turn a man out for an act of their own, and not any fault committed by him; for the election is a corporate act; and shall they after they have allowed and admitted it good, by owning and receiving him as a member, be allowed to come and call this a void election?

Then it was urged, that this is a very dangerous as well as needless power, because it would give a corporation a power to rid themselves of what members they please; for let a man have ever so much right on his side, yet he must lose his franchise during the whole time * of dispute; and it is likewise a very needless power, because the law has sufficiently provided for it by *quo warranto's*.

Another exception was, that it was not averred in the return that the reason they give for not restoring him was the reason for which they turned him out. And that this is necessary, appears from *Bagge's case*, where it is expressly said in the return *ex causis prædictis amotus fuit*. And if this were not so, a wrongful expulsion might come to be a rightful one; for if it need not appear in the return for what cause he was expelled, any accident happening between the removal and the return will in fact justify the removal.

Then it was observed, that the return was contradictory to itself; for it was said, in the first place, that *de facto fuit electus*, and afterwards that his election was void, he not having received the sacrament. Now *electus* in one part of the return must bear the same sense as in the other, unless the addition of the words *de facto* makes any alteration, which he supposed they did not.

Mr. *Lutwyche* for the return:

Cases quoted in favour of the return.
2 Jones 131.
King and Thacker.
King and Slafford,
8 W. 3.
Salk. 428.
5 Mod. 316.
11 W. 3.
Nº 30. in the Crown Office,
King and Mayor of Abingdon,
Salk. 431.
2 Lev. 184.
* P. 177.

The act of parliament of 13 Car. 2. says, that the placing election or choice of a person not having, &c. shall be void; and where an act of parliament makes a thing absolutely void, every person may and ought to take notice of it.

No precedent to be found of any *mandamus* without the suggestion of *debite electus & præfectus*, which supposes it a necessary part of the writ, and then necessary for it to be answered. There is a difference between an election void and voidable; that in the present case is not voidable, but void. And the act of parliament in saying the election shall be void, has in effect said, there shall be no proceedings by *quo warranto's*.

As to the case of the advowson, *nihil ad rem*, because no act of parliament in the case. But in the case of a simoniacal presentation, notwithstanding institution or * even induction, the presentation is absolutely void; and the church may be presented unto as void, without bringing any *quare impedit*.

Trinity Term 12 Ann.

In case of an ejectment, unless the person turned out, though by one that has no right, can prove his right, he shall not recover, and this is a possessory action.

As to the objection, that this way a corporation may have it in the power to rid themselves of what members they please: the answer is, that this objection implies malice; and if a corporation be malicious, they may turn a man out for nothing, and then may return for cause, any false crime they think fit; and in the mean time the man is out of his franchise.

Reply per Lechmere:

A great part of Mr. Lutwyche's argument turns upon this, that the statute makes the admission, as well as election void; whereas the statute says not a word of admission, unless the word *placing* be interpreted to mean *that*. Now from the word *placing* being put *before* election, it is highly probable that it had no relation, in the intention of the legislators to admission, an act *subsequent* and *consequential* of election; and *ex vi termini*, *placing* no more imports admission, than it does election. Possibly the term *placing* may, in the act, signify some other way of coming in than by election, viz. by patent; a frequent practice in those days, when the act was made.

As for the advowson; *that* was mentioned only to shew, that the law allows of a possessory right, even in matters of an incorporeal nature, as well as in land.

As to simony, the act of parliament relating to that matter, very different from this, for it makes all void, as if the incumbent were naturally dead. *Adjournatur*.

* Queen and Corporation of Buckingham. B. R. * P. 178.

SIR Peter King made another argument, in the case of another person; but where the return was the very same as before. See ante 173.

He objected, that in the return they had not set forth, that the act of parliament made the election void; only said, that in default thereof, such placing, &c. was void, but not said by what authority void.

He objected again, that the return had not brought the office within the act of parliament; for the office of capital burgesses is not named in the act of parliament. It was, indeed, attempted to be brought within it two ways: 1st, By setting forth, that it was an office relating to the government of the town. But this not enough; unless they had gone one step further, and shewn *how* the office concerned the government of the town, that so the court might judge, whether it did or not.

The

Trinity Term 12 Ann.

The 2d way is, that, as the act does mention common-councilmen, they said *Quod quilibet communis burgenfis*, was and has been since, a member of the common-council. But this not enough; for they ought to have said, that *Quilibet communis burgenfis, virtute officii prædicti*, was a member of the common-council.

He objected further, that the return had not sufficiently answered the writ.

The writ avers him to be *debite electus & præfectus*; the return is, that *de facto fuit electus*, which is no answer. They should have done, as in pleading to bond usurious, or simoniacal, admitted the fact, viz. *Quod debite fuit electus*, and that *electio devenit vacua*.

As the election is not properly answered, so neither is the *præfectus*. A man may come in either by election or prefection, viz. placing in of the crown. They say, that * he was never at any other time *electus*; but it is not said, that he never was at any other time *præfectus*.

Upon a former argument in this case, Judge Powys, junior, had desired the counsel to consider, whether the act did not make the taking the sacrament, a precedent condition to the office?

In answer to this, Sir Peter put the following case, Suppose a man having received the sacrament within the year, applies to be sworn in, is refused, then gets a peremptory *mandamus*, afterwards he refuses to subscribe, can any man say, that contrary to the express judgment of this court, he was never elected? and yet the act of parliament is as strongly penned, to make the election void for not subscribing, as for not taking the sacrament; therefore it is plain, that neither the omission of the one or the other makes the election void, but only capable of being avoided.

This further appears from the case of *King and Larwood*, 4 Mod. 269. for if the taking, &c. had been in nature of a precedent condition, *Larwood* could never have been punished, because he would not have been legally chosen into the office.

The statute *de donis* says, A fine shall be *ipso jure nullus*; and yet the meaning is not, that it shall be absolutely void; but only, that it shall not be a fine to bar the issue; for it is a fine to make a discontinuance, &c.

The statutes relating to sheriff's bonds, and usurious bonds penned in very strong terms; and yet the bonds void only as to their efficacy; for in those cases, one cannot plead *non est factum*. 3 Cro.

Statute about striking in church-yards, says, that the party *ipso facto* shall be excommunicate; and yet a proper process is necessary.

If by the statute of simony, the simoniacal presentation were entirely and to all intents and purposes void, the * Queen would have no title

* P. 179.

Salk. 167.
3 Salk. 134.
Vide contra
2 Ventris 247.
Clerk's case,
where elec-
tion held void
for want of
taking, &c.

Statutes of
sheriff's and
usurious
bonds.

Hob. 72, 166.

Statute of
striking in
church-yards.

Statute of
simony.

* P. 180.

Trinity Term 12 Ann.

title at all to present; for it is the manner of the presentation that gives the Queen the title.

Hobart 166. A thing may be void, and yet not to be avoided in every manner.

He argued from the reason of the case in *T. Jones* 215. *King* and *Turner*, that it did not lie in the breast of the corporation, contrary to their own admission, to call in question the validity of the original election; and though this would be no good answer to the crown, yet to the corporation it is, You have admitted him.

In the last place, he held it necessary for it to appear in the return, that they had summoned him.

See *Queen and Borough of Aldborough*, Ant. 101, 102. Court.

Judge *Eyre* declared his present opinion to be, that the acts of parliament instanced in to prove the election not void, but only voidable, did not reach the present case; because all of them related either to matters of record or specialties entered into with some ceremony; and therefore although the statutes made them void, yet it must be understood in a proper manner, and acts of parliament do always suppose necessary incidents: but now this case, is the case of an election; a matter *in pais*, and so very different.

* Michaelmas Term

* P. 181.

12 Annæ. B. R.

Backhouse and Wells.

THIS was an ejectment; and the question arose upon the construction of a will, whether the words of it made the devisee only tenant for life, or tenant in tail?

The devisor being seised in fee of the lands in question, makes his will thus:

' To the intent that all my lands should remain in my name and blood, I devise to *J. S.* my near kinsman, such and such lands, &c. to have and to hold, for the term of his natural life only, without impeachment of waste; then to the issue male of his body lawfully to be begotten, if God shall bless him with such issue; remainder to the heirs males of the body of that issue.

VOL. X.

I i

It

Eq. Ca. Abr. }
184. pl. 27. } *J. C.*
8 Mod. 264. } *J. C. cited.*
Fort. 133. } *J. C.*
Ejectment.
Question,
whether devisee was tenant for life, or tenant in tail.

Michaelmas Term 12 Ann.

Argument for
plaintiff.

It was argued in favour of the plaintiff, that the devisee was by this will only a tenant for life, and so consequently had no power to levy a fine, or suffer a common recovery, under which the defendant claimed.

* P. 182.

* That this was the intention of the testator, appears 1st, From the preamble, which signifies it to be his intention, that his lands should remain in his name and blood; from whence it is not probable that he would, by making the first devisee tenant in tail, put it in his power, by suffering a common recovery to bar, &c.

2^{dly}, This appears to have been his intention, from the words of the will, which are, *To have and to hold for the term of his natural life only.*

The clause likewise, *without impeachment of waste*, had been needless, if so be the testator had designed to make him tenant in tail.

And from the words *to the heirs males of the body of that issue*, it was inferred, that the testator plainly designed to vest the intail in the issue, and not the first devisee.

6 Co. Rep. 16. *Wylde's case*. If in a will such proper words are made use of as would in a deed pass such an estate, nothing but the plain intention of the testator to the contrary shall ever put another construction upon the words.

Devise to a man and his children, where the man has no children, must pass an estate-tail, because it must be the intention of the testator to have it so, and otherwise the word children would be of no signification.

The case of *King and Melling* reported in 2 Lev. 58. and 1 Vent. 225. very different from the case at bar. There was not in that case the restrictive word *only*, and the clause without impeachment of waste, as in ours: besides, *there*, *Hale* argued strongly from the intention of the testator, which in a will, and also in an estate-tail, of which the statute says *voluntas donatoris*, &c. ought to carry great weight.

Now *here* the intention of the testator is strongly with us.

* P. 183.

* From the difficulty with which the judgment was given in the case of *King and Melling*, it appears the judges went as far as they could go.

The case of *Taylor and Sayer*, 1 Ventris 229. Raym. 82. *Pollexfen* 106. several times denied to be law.

Argument for
defendant.

It was argued for the defendant, that no such intention could be collected either from the preamble, or words of the will.

As to the preamble; it must be considered as a general preamble, that extends to the whole will; and consequently to all the devises in the will, as well as the devise in question, and therefore, from the preamble, it cannot appear, that it was his intention to make this devisee tenant for life, any more than some others, that he has confessedly made tenants in tail.

Indeed

Michaelmas Term 12 Ann.

Indeed it does appear what were his motives in the choice, he made of devisees, viz. their being of his name and family, but nothing further.

As for the observation made from the clause, *without impeachment of waste*; it is in other parts of the will needlessly inserted, and so it may here.

As to the inference made from those words, *if God shall bless him with such issue*, that they import a design of giving a contingent remainder to that issue: it was answered, that the preceding words, viz. the remainder *To the issue male of his body lawfully to be begotten*, were the operative words, and which, conjoined with those that precede them, vested an estate-tail in the devisee.

As to the inference from the words, *to the heirs males of the body of that issue*, that the estate-tail was vested in the issue: it was answered, that whether the estate-tail was vested in the devisee or issue, those words must be superfluous; for issue, being *nomen collectivum*, without saying more, imports an estate-tail. 1 Vent. 229.

As to the expression, *for the term of his natural life only*; if the word *only* were left out, since the case of *King and Melling*, it could be no objection. And as to that * word, it is plain tautology; for * P. 184. an estate for life, is an estate for life only; and then the case remains the same with the case of *The King and Melling*.

Issue, no appropriate word of purchase in a will, though perhaps in a deed it may be so; and yet *Mich. 8 Anna, Lee and Bruce*, the word issue was used in a deed, as a word of limitation.

In a will it is a word that has no determined signification, but must be governed by other circumstances; and most commonly it is used as a word of limitation.

Lutwyche pro quer. Lechmere pro def.

In the next term, Chief Justice Parker delivered the opinion of Court. the whole court, that by the devise the devisee was made tenant for life, remainder to the issue in tail. The words of the will, he said, were so express to this purpose, that neither any words that could have been used, or any arguments could make it plainer. This, he said, was both the obvious and legal import of these words, and what they would have imported in a conveyance.

Jackson and Laveright. B. R.

THIS was a writ of error out of the court of C. B. where an action upon the case was brought for enclosing so many acres of land, parcel *communæ pasturæ*, &c.

Error.
Case for enclosing of Common.

Now

Indeed

Michaelmas Term 12 Ann.

Judgment in C. B. affirmed, because the word *communia*, used in the declaration, does in common parlance, and in acts of parliament, signify a common, tho' in legal proceedings it is generally used for an incorporeal right.

* P. 185. Cases quoted pro quer. in error, 1 Ventris 260. 2 Cro. 272. 2 Ventris 262, 174, 73. Case of Beadick and Wilson, two years ago. Ante 170.

For the defendant in error.

Now it was urged, that the word *communia* did signify, not the place, but the right of commoning; and a right being a thing of an incorporeal nature, was no more capable of being inclosed than a rent, *Bracton, lib. 4. cap. 4.* and this definition of the word is given in *Fleta, lib. 4. cap. 19.* That it did import any right which a man was to enjoy in common with others in *alieno fundo*; as *communia pasturæ, piscandi, &c.* A grant of * *communia* alone would pass nothing. A grant of *communia pasturæ* would not pass the soil, *Cro. Jac. 579. a fortiori* in pleading it cannot import the soil. *Nec non* in pleading amounts to an affirmative, *contra* in a grant. The reason of the difference is, that in pleading the rules of grammar must take place, but in grants the intention of the party shall govern the construction. The word *tenentes* in pleading never signifies tenants for years, but *tenentes terrarum* tenants in fee. Case of *Reokby, Mich. term 9 Anna.*

Plaintiff himself, in another part of his declaration, has used the word *communia* in the proper sense, as signifying a right, *ratione iude communiam, &c. habuit.*

If it be objected that the word *communia* may be rejected as surplusage, yet even then the declaration will remain nonsense; for then it will be for inclosing so many acres *terra, viz.* Arable land (for that is the legal import of the word *terra*) parcel *pasturæ.*

It was urged in favour of the defendant in error, that this word *communia*, if it made the declaration nonsense, should be rejected as surplusage. But it was strongly argued, that this word *communia* not being a classical but a legal and technical word, and being a word which in common parlance, nay in acts of parliament, sometimes signifies the place as well as right of common, might, especially after a verdict, be received in the same sense; and many are the cases where improper and impossible words have been aided by a verdict. 3 *Levinz* 336. 1 *Rolle's Abr.* 577. *Styles* 296.

8 Mod. 240.

Justice Eyre: Very hard, that after a verdict this word should not receive that sense, which it will do in common parlance, nay in acts of parliament, and very good authors; as in *Du Fresne's Glossary, Vol. 1.* upon this word.

* P. 186.

* *Powys junior* of the same opinion; for if the word was not capable of receiving this sense, he did not see why it might not, after a verdict, be esteemed a mistake of the clerk, instead of *communis.*

Ante 170.

He likewise thought it might be rejected as surplusage; for though the legal import of the word *terra* when standing alone is arable, yet the word *terra* in conjunction with other words will signify all sorts of land; as here *acras terræ*, is conjoined with the following words

Michaelmas Term 12 Ann.

words *parcel. pastura terra vocat.* and thus no absurdity at all follows the omission of the word *communis*. *Adjournatur.* Judgment afterwards given *pro def.* in error.

Queen and Nun. B. R.

THIS was an indictment found before the justices of peace, at the sessions, for these words spoken of justices of the peace by Nun, at such time as he was by warrant brought before them.

This is no justice of peace's business, you shall not try this matter, have a care what you do, I have blood in me, if I had you in another place.

Not guilty pleaded; but upon being found guilty,

It was moved in arrest of judgment, that these words were not indictable.

In the case of *Queen and Langley*, 2 *Anna*, term *Hil.* and in 2 *Rolle's Abr.* 78, 79. resolved, that words are not indictable, unless they have a direct and immediate tendency, and not by construction and implication, to the breach of the peace.

Queen and Wrightson, *Pasch.* 7 *Ann.* calling a justice of peace, *Ass.*, *Fool*, and *Coxcomb*, for making such a warrant, held not indictable.

* *Queen and Soley*, *Mich.* 4 *Ann.* saying of a justice of peace, *That he would judge in any cause brought before him according to his affection*, held not indictable. * P. 187.

Queen and Lycassell, *Hil.* 1712. saying of a justice of peace, *he deserved to be banged for making such a numskull order*, held not indictable.

1 *Mod.* 3. *Laying his hand upon his sword*, and saying, *If it were not assize-time, I would not take such language from you*, held no assault.

It was likewise insisted upon, that if these words were indictable, yet they were not indictable before justices of the peace, but *oyer and terminer*.

To maintain the indictment, the case of *Lord Darcy in the Star-Chamber*, *Hobart* 120. was quoted, where *You lie, and I will maintain it, with my life*, held words finable.

That this was a case in the *Star-chamber*, is no objection to its authority; because whatever authority that court exercised lawfully, the same may this court.

It was likewise said, that the present case differed from all those cited in *this*, that though they were words spoken of justices of the peace, yet it was of justices when absent; whereas here the justices were present, and presiding at the sessions.

Michaelmas Term 12 Ann.

Court inclined to the opinion, That the words were not indictable, as laid in this indictment; because they did not carry any necessary intendment of a challenge, or intent to break the peace, as in Lord *Darcy's* case the words do; especially when it appears in this very indictment, that this *Nun* was a wheelwright, and so not likely to challenge or be challenged.

* P. 188.

* Queen and Stafford. B. R.

St. Tr. 101.

Outlawry for treason.
Form in reversing it.

STAFFORD had been outlawed for high treason, and had obtained from the crown a writ of error to reverse this outlawry; and the Attorney General had orders to confess in court the error assigned, which was an error in *fact*, viz. That he was outlawed by a wrong addition, which the attorney did accordingly: the court was therefore prayed, that the outlawry might be reversed.

Whether scire facias to ter-tenants necessary.

But Chief Justice *Parker* was of opinion, that though in outlawry for treason there is no need of warning the lords, of whom the lands are held by a *scire facias* before the outlawry be reversed, as must be done in case of felony, because in treason the forfeiture is to the crown; yet he saw no reason to distinguish between outlawry for felony, and outlawry for treason, as to the ter-tenants; for in case of treason, where the forfeiture is to the crown, the crown may grant these lands to others, who ought to be heard what they can say for themselves, before they lose their lands.

He thought therefore, there should have been a *scire facias* to the ter-tenants; and grounded himself pretty much, upon a case in *Hen. 4.* where there was a *scire facias* to the ter-tenant; and though this was an outlawry for felony, yet the King's being immediate lord, made it all one as if it had been an outlawry for treason.

And the entry, in case of felony, as may be seen *Cook's Entries* 318. mentions the suing out of a *scire facias* as a thing of absolute necessity, without which the judge could not reverse the outlawry.

* P. 189.

But upon searching into precedents, it was found, that in fact, in outlawry for treason, there used to be no *scire facias*; and the precedents being so, and it being * a supposition, not of necessity, that the crown should grant these lands, and then out the patentees, by suffering a writ of error to be brought, the outlawry was reversed.

Turner

Michaelmas Term 12 Ann.

Turner and Goodwin. B. R.

THIS case had been argued last *Easter* term, and came now to be spoken to again. It was an action of debt upon a bond, conditioned for the payment of so much money, the plaintiff assigning over to the defendant such a judgment against *D*. See ante 153.
Condition.

Serjeant *Pratt* for the defendant, insisted, that the assigning was a condition precedent to the payment. For the defendant.

It was said, that in the obligation there were very proper and significant words to make a condition, either precedent or subsequent; that therefore it should be taken either one way or the other, as would best answer the intention of the parties. Cases quoted
arguendo.
1 Saund. 320.
1 Jones 189.
Spring and
Caesar.
3 Lev. 132.
Edwards and
Hammond.
Cro. Car. 433.
5 Co. Rep. 78.
Grey's case.
1 Ventris.
Large and
Cheshyre.

Now the intention of the parties undoubtedly was, that the plaintiff should have the money, and the defendant the judgment. But now this intention could never be supported, taking it to be a condition subsequent; for the money once paid, cannot be brought back again in case the judgment should not be assigned over.

The law lays such a stress upon supporting the intention of the parties, that it will interpret words not at all proper to amount to a condition, rather than the intention of the parties should be violated; as the common case of *Co. Lit. 24.* grant of an annuity *pro concilio impendendo*.

It cannot be objected, that the defendant ought to have concurred in doing this act, and requested the plaintiff to assign, &c. because this was an act that it was in the power of the plaintiff to perform alone; for the judgment would immediately upon the assignment vest * in the defendant, before his acceptance of it. *Case of Butler* * P. 190. 1 And. 348.
Poph. 87.
3 Co. 25.

Serjeant *Cheshyre* insisted for the plaintiff, that the defendant was bound to do the first act, *viz.* to offer to pay the money, though he acknowledged that the payment of the money and assignment of the judgment were to be concomitant acts in the execution. For the plaintiff.

He relied much upon the replication of the plaintiff, which, the defendant having demurred to it, must be admitted as true. In this replication the plaintiff says, that he was ready to assign, &c. and requested the defendant to pay the money, which the defendant refused. This refusal the serjeant insisted to be an absolute refusal, and not a conditional one, *viz.* unless the judgment was assigned. And this absolute refusal of the defendant to pay the money, he insisted upon to be a sufficient discharge to the plaintiff from preparing the assignment.

In 1 *Lutwyche* 245, *Thorpe* and *Thorpe*, most of this sort of learning is stated. *Vide post. Trin. 13 Ann.*

Michaelmas Term 12 Ann.

Seftern and Cibber. B. R.

Debt by assignee of bail-bond.

1st objection to the declaration.

* P. 191.

2d Objection.

3d Objection.

Court.

THIS was an action of debt, upon a bond brought by the plaintiff as assignee of a bail-bond; and upon demurrer, these objections were taken to the declaration.

1st, That the breach of the condition was set forth to be, his not appearing *secundum exigentiam brevis*, & *secundum formam brevis*; whereas it ought to have been, his not appearing at the return of the writ. 1 Levinz 145. 3 Levinz 243.

* 2dly, It was objected, that the very foundation of the action, viz. the breach, was set forth by way of recital, *cumque etiam non apparuit*; which ought to have been expressly averred, that so the defendant might have the liberty of traversing it. *Cro. Eliz.* 441. 2 Jones 197. 2 Levinz 206.

3dly, Not set forth upon what day the writ was returnable; and then *non constat*, whether he did or did not appear *secundum exigentiam brevis*; whether the bond was, or was not forfeited.

Judge Eyre: This case differs very much from the case of a sheriff suing this bond himself; for there he has nothing to do, but declare upon the bond; but where the action is brought by the assignee, there it is the forfeiture that gives the action; which here is the non-appearance, and is a matter traversable, and must not be set forth by way of recital, but must be positively averred.

It is true, that the declaring in an *indebitatus assumpsit* is *cumque etiam* he was indebted: so in a bond, *quod cum per quoddam scriptum suum obligator*. But then in the first case it is the promise, and in the second the breach of the condition, which gives the action; both which are ever positively averred, and not set forth by way of recital.

Chief Justice Parker: Not true, that there is no traversing what is only set forth by way of recital; for the pleas of *non assumpsit*, and *non est factum*, are both of them pleas that traverse matters, in those respective actions, that are pleaded by way of recital.

The return of the writ not being set forth, a fatal objection.

Vide case of Norton and Syms in *Hobart's Rep.* 12. and Turner's case in 8 *Co. Rep.* 132. *Adjournatur*.

Johnson

Michaelmas Term 12 Ann.

* Johnson and Altham. B. R.

THIS was a writ of error out of the court of C. B. in an action upon the case; and it was insisted upon for error, that there should have been no final judgment, but a *respondeas ouster*.

But it was insisted by the defendant in error, that it was the conclusion of a plea that made it either a plea in bar, or a plea in abatement, be the matter of that plea what it will; and that here the plea was concluded with a *petit judicium de narratione*, which is always the conclusion of a plea in bar; and therefore a final judgment was rightly given.

Court: It is true, that it is the conclusion of a plea, be the matter what it will, that makes a plea, a plea either in bar or abatement.

It is true likewise, that *petit judicium de narratione*, is generally the conclusion of a plea in bar; for where there is either a writ or a bill, the demanding judgment of the declaration is a confession that the writ or bill is good: but the difficulty in this case arises from hence, that here is no writ or bill, but the declaration is the first step. *Adjournatur*.

Queen and * Muscot. B. R.

A Question was started in an indictment for a judicial perjury, whether one produced as an evidence for the Queen, might not be examined upon a *voyer dire*, as the common usage is in civil actions?

It was insisted by the counsel for the Queen, that the question should not be put, because the consequence would * be, that no such prosecutions could ever go on; for there is scarce any prosecutor, but if asked, whether he be interested in the event of a cause, must say he is. For example, Where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest, for he will be intitled to restitution, and yet his evidence is admitted. So likewise, where an indictment is removed by *certiorari* from the sessions into B. R. notwithstanding the prosecutor in that case, if the defendant be convicted, is by the statute intitled to his costs, yet he is allowed as a witness.

So likewise there are several cases where, though a man will in case of conviction be intitled to forty pounds, yet his evidence shall be received.

* P. 192.
See post. Hil.
12 Ann.

Writ of error
upon action
upon the case.

Question,
Whether the
plea was a
plea in bar
or in abate-
ment.

* Muskett.

Pleading.
Evidence.
Whether evi-
dence for the
crown may
be examined
upon a *voyer*
dire?

* P. 193.

In some cri-
minal cases
interested per-
sons are al-
lowed as wit-
nesses.

Michaelmas Term 12 Ann.

And as to the cases of *The Queen* and *Duke of Leeds*, and *The Queen* and *Cobham*, where the informer was refused to be an evidence; there is this difference between those and the present case, that there it did appear upon the face of the record, that the parties produced as witnesses were interested.

In hue and cry, the evidence of the person robbed always allowed as evidence.

Court.

Two ways of proving witness to be interested persons, viz. either by bringing other evidence to prove it, or else by swearing the witnesses themselves upon a *voyer dire*; but both these ways must not be made use of at the same time.

* P. 194.

Interested persons allowed to be witnesses only in cases of necessity.

Chief Justice *Parker*: It is a principle of the common law, that every man shall be tried by a fair jury, and that evidence shall be given by persons disinterested. The law gives the party tried his election, to prove a person offered as evidence, *interested*, two ways, viz. either by bringing other evidence to prove it, or else by swearing the person himself upon a * *voyer dire*; but though he may do either, he cannot have recourse to both. It was never objected before, that a person should not be sworn upon a *voyer dire*; nor will it (I hope) ever hereafter. Objections have indeed been started as to the nature of those questions, that shall be put to a witness upon taking such an oath.

As to the case of the robbery, that is founded upon the necessity of it, and *that* only.

* As to the cases put upon the statutes where forty pounds reward, &c. they admit of this answer, that the intention of those acts will be quite defeated, if so be the reward is to take off their evidence.

The same answer likewise may serve to the cases put upon an indictment of felony for stolen goods, and where the indictment is removed by *certiorari*, &c. For who in the first case but the owner can prove the property of the goods? and in the second, if the giving of costs should take off the evidence of the prosecutor, that act of parliament which was designed to discountenance the removing of suits by *certiorari*, would give the greatest encouragement to them that is possible. As for the distinction taken between the interest of the witness appearing upon record, and its appearing some other way, it is an irrational distinction, and a reflection upon the wisdom of the law.

As to the objection taken from the inconvenience of putting the general and common question, because probably he must answer it in the affirmative; nothing in it, for he may be asked to explain the nature of his interest, that so the court may be judge, whether his interest is such as ought to exclude his evidence.

He was accordingly sworn upon a *voyer dire*.

Chief Justice *Parker*: (In summing up the evidence, *inter alia*) There is this difference between a prosecution for perjury, and a bare contest about property, that in the latter case the matter stands in different;

Michaelmas Term 12 Ann.

different; and therefore a credible and probable evidence shall turn the scale in favour of either party: but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it, until disproved. Therefore to convict a man of perjury, a probable, a credible evidence not enough; but it must be a strong and clear evidence, and more numerous * than the evidence given for the defendant, for else only oath against oath. Strong evidence necessary to prove perjury. * P. 195.

A mistake not enough to convict a man of perjury; the oath must be not only false, but wilful and malicious. A mistake as perjury.

I remember a case, ruled by my predecessor, where a person swore, that he saw and read such a deed, and it proved upon the trial to be only the counterpart, which he saw; and yet held no perjury, because only a mistake.

It is my opinion, that perjury may be committed in a circumstantial matter, though I do not remember that, in fact, it was ever carried so far. I have heard a case mentioned in King William's time, where the question being put about the sealing of a deed, it was sworn that the party was, at such a time, in such a place, and consequently could not seal the deed; and upon this oath he was convicted of perjury. But now though the matter of this oath was but a circumstance, considered in relation to the point in question, upon the trial, in which the oath was given, yet it was all his oath, his entire evidence. Whether perjury may be committed in matters of circumstance only. Salk. 513.

But if perjury may be committed in matter of circumstance, it must be a material circumstance; a circumstance of that weight, that without it he could not hope to find credit with the jury.

* Hilary Term

* P. 196.

12 Annæ. B. R.

Harrison and Thornborough.

THIS was an action for words, viz. Harrison got a witness to forswear himself in such a cause, you or he (innuendo the plaintiff) hired one Bell to forswear himself. And for these following words, spoken at another time, Two dyers are gone off, (innuendo become bankrupt) and for ought I know, Harrison Action for words. * P. 198.

rison will be so too, within this time twelve-month; verdict for the plaintiff, and joint damages given. And now the court was moved in arrest of judgment, that the words were not actionable.

Objections in arrest of judgment.

Hob. 268.

For though the first branch of the words, if they were alone, are certain enough; yet when he goes on and says, *You, or the plaintiff, bired one Bell to forswear himself*, it becomes altogether uncertain to whom the words relate; and to this purpose were cited 1 Roll's Abr. 81. and 1 Cro. 497. where the words were, *one of you three, &c.*

* P. 197.

It was objected likewise, that the words were not actionable, because they did not set forth that what the witness * was sworn in, was a material point in the cause.

It was said further, that supposing these words were actionable, yet if the following words, that were spoken at a different time, were not actionable, that then the damages being joint, the judgment must be arrested.

Office of innuendos.

Salk. 513.

And it was said, that those words were not actionable, because the word *gone off* was a word capable of various constructions; and was therefore to be taken in the most favourable sense. 3 Mod. 155. action brought for these words, *broken, run away, and will never return again*; and court divided.

And if the words themselves were not actionable, the innuendo will not help it; for an innuendo is not to set forth new matter, but to refer to something already mentioned in the declaration. *King and Greepe, Newnham, innuendo Newnham in Devonshire.* 4 Co. Rep. 20. a. burnt my barn, innuendo full of corn. In both these cases innuendo void, because it sets forth new matter.

It was likewise said, that the action would not lie unless Bell had actually sworn himself; which perhaps the words *got, &c.* do not necessarily imply.

Court.

Precedents in actions for words not of the same authority as in other actions, because words alter in their signification.

Actions for words of no great antiquity.

Hob. 268.

4 Co. 20.

3 Cro. 277.

* P. 198.

Court of opinion, that the plaintiff should have judgment. Precedents, not of equal authority in actions for words, as in other actions, because *norma loquendi*, is the rule for the interpretation of words; and this rule is different in one age from what it is in another. The words that an hundred years ago did not import a slanderous sense, now may; and so *vice versa*.

In this kind of actions for words, which are not of very great antiquity, the courts did at first, as much as they could; discountenance them; and that for a wise reason, because generally brought for contention and vexation; and therefore when the words were capable of two constructions, the court always took them *mitiori sensu*.

* But latterly these actions have been more countenanced; for men's tongues growing more virulent, and irreparable damage arising from

Hilary Term 12 Ann.

from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule therefore, that has now prevailed, is, that words are to be taken in that sense that is most natural and obvious, and in which, those to whom they are spoken, will be sure to understand them.

The words *you or he, &c.* do not render the former uncertain; for they relate not to the *getting, &c.* but to new matter, *viz.* who paid the money.

Besides, if the words were *A. or D. did, &c.* either *A.* or *D.* might bring an action; but then there must be an averment, that neither of them did it.

Not necessary to the maintaining of this action, that *Bell* did in forswear himself.

The signification of the words *gone off*, very well known among merchants.

The doctrine laid down concerning *innuendo's*, undoubtedly true, *Hob. 2, 3, 6,* when understood of matters of fact: but here the *innuendo's* were not introductory of new matters of fact, but only explanatory of the foregoing words. Judgment *pro quer.*

Cases quoted by the counsel for the plaintiff, in answer to the uncertainty of the words, were *Latch 219. 2 Keble 718. Styles 142. 2 Cro. 407. Raym. 217. 1 Levinz 277. 1 Cro. 236. Dyer 72.*

Queen and Delme. B. R.

THIS was an information against *Delme*, for exercising the office of Alderman in the city of *London*, not being duly chosen. When the trial came on, the counsel for the *Queen* challenged the array, because * one of the sheriffs was one of those returned to the court of Aldermen: this challenge being allowed, a *venire facias* was directed to the other sheriff; and then the counsel for the defendant challenged the array, because returned by a sheriff, that was concerned in interest, as he was a freeman of the city of *London*; upon this a *venire* was directed to the coroner.

Challenge-
Information
for exercising
Office of al-
derman.
* P. 199.
Challenges to
the array.
Salk. 152.

Salk. 152.
Hob. 235.

But before any return, the counsel for the *Queen* entered a suggestion upon record, setting forth, that the question to be decided upon this trial being, whether the right of election was in the freemen only, or in all those who paid scot and lot, (freemen or no freemen) it appeared from the nature of the thing, that it was impossible for an impartial jury to come out of *London*, and therefore they prayed a *venire* to the sheriff of *Surrey*, the adjacent county.

Hilary Term 12 Ann.

Motion to set aside a suggestion entered upon record.

The court was now moved to set aside this suggestion, as being out of time, and inconsistent with what they had before admitted upon record.

For it was insisted, that this suggestion containing no new matter arising subsequent to, or not known at the time, when, upon the allowance of the challenge to the array, for the partiality of one sheriff, the *venire* was prayed to the other and granted, it was now too late to make it.

But what was most strongly urged was, that the counsel for the Queen, by challenging the array, and praying a *venire* to the other sheriff of London, had thereby admitted upon record, that an impartial jury might come out of London; and therefore they should not now, in disaffirmance of what they had before admitted, be allowed to make this suggestion.

It was said that these suggestions were in their nature odious, as tending to put things out of the usual course of law.

* P. 200. These suggestions being in the nature of challenges, whatever cases would prove such sort of challenges unlawful, * must, by parity of reason, prove the illegality of the suggestion.

Cases quoted were 22 Ed. 4. f. 3. *placito* 11. Cro. Jac. 35, 36. 15 H. 7. 9. *Robinson's Entries*, pa. 144. Moore 894. 4 Ed. 4. 6. Dyer 25. 2 Rolle 637. Earl of Kent's case, 2 Rolle 643.

Econtra.

In the following term it was insisted, in favour of the suggestion, that the defendant, by his challenge to the array, had destroyed whatever admission upon record the suing out the *venire* to the other sheriff might amount to.

For the sake of having trials fair, and to prevent delay of justice, challenges are favoured in law; hence allowed by law to make several challenges at the same time. Co. Lit. 158.

Though a challenge be *in esse* at the time of the former, yet if the party had not, by reasonable intendment, notice of the cause of challenge, he is not estopped: now this suggestion depends intirely upon the knowledge of the customs of the city of London, which customs the crown is a stranger to.

Crown has several privileges in pleading.

Besides, there is no arguing from proceedings at law between subjects, to suits where the crown is party; because the crown has several privileges above a subject; as the crown may waive their demurrer, take issue and waive that issue, *Vaughan* 65. *Dyer* 53. 1 *Ventria* 17. the crown may change their own *venue*. The Queen may amend her pleadings at any time; nor will any estoppel bind the crown, *Hobart* 339. 1 *Siderfin* 412. *Adjournatur*.

Hilary Term 12 Ann.

Abrahat and Brandon. B. R.

THE arbitrators taking notice of the difference between the parties, award, that the defendant shall pay to the plaintiff so much money upon the 1st of April, so much upon the 1st of May; and that the parties shall pay one pound five shillings each, to the arbitrators, for the trouble; and that upon payment *prædict'* upon the 1st of May, the parties should give mutual releases to the time of the making the award.

Com. Rep.

250.

* P. 201.

Award.

A release a-

warded to be

made to the

time of the

award, good;

for not to be

intended that any new difference has arisen between the time of the submission and of the award. A release of all, &c. to the time of the submission, a good performance of an award, ordering a release to be given of all, &c. to the time of the award, for that part of the release which extends to the intermediate time out of the power of the arbitrators.

It was objected to this award, that it was made *ex parte tantum*; for nothing was awarded in favour of the defendant but the release, which the defendant had no remedy for at law; for the plaintiff was not by the award bound to make the release until after payment *monet' prædict'* upon the 1st of May. Now *monet' prædict'* refers not only to the sums awarded to be paid upon the 1st of May, but all the sums, and therefore to the sum awarded to be paid to the arbitrators, which part of the award is entirely void.

Hob. 49, 50.

Besides, the release awarded by the arbitrators is a release exceeding their power, which extends only to the time of submission; whereas the release, according to the award, extends to the time of the award made.

Court of opinion, the award good; for *monet' prædict'* shall refer to all the sums that concern the justice of the award, but not that sum which does not, and as to which the award is void.

And as to the second objection, it is capable of two answers; one a common one, *viz.* That it shall not be intended that any new difference has arisen between the time of the submission, and of the award, unless it be shewn especially that there has.

Salk. 74.

Salk. 75.

The other answer is, that a release of all, &c. to the time of the submission, is a good performance of an award, ordering a release to be given of all, &c. to the time of the award. This Chief Justice Parker said he took down from Chief Justice Holt's own mouth, in the case of *Freemen and Bernard*, 8 Will. The counsel likewise quoted *Lutw.* 524, 549. to the same purpose. The reason is plain, because that part of the release, which extends to the intermediate time, exceeds the power of the arbitrators.

Salk. 69.

* P. 200.

Hilary Term 12 Ann.

Queen and Corporation of Helston in Com. Cornwall. B. R.

Motion for a
new trial.

THE question was, If upon a trial a point in law be started by the judge, and the counsel do not take it up, but insist upon other facts, which are found against them; whereas had the counsel insisted upon the matter of law stirred by the judge, the verdict must have passed for them, whether this is sufficient cause to move for a new trial.

When grant-
ing new trials
began.

Where grant-
able.
Salk. 649.

Chief Justice *Parker*: The granting of new trials of late original; it began about the year 1652. when the first new trial was granted for excessive damages. Experience shews, that they are grantable, as well for a fault in the judge, as jury, in causes tried at *Nisi prius*; because a judge of *Nisi prius* acts rather in a ministerial than judicial capacity; and the ground and foundation of granting new trials, when either the judge or jury are to blame, is one and the same, viz. doing justice to the party.

The question in this case, I take to be this, whether we are so bound down by forms of law, as that though we see a verdict given contrary to a point of law, (which the judge himself took notice of, and yet for want of the counsel's doing their duty to their client, was not insisted upon) we cannot grant a new trial.

When a point of law arises, whether the counsel insist, or not insist upon it, Judge bound to direct the jury accordingly.

But yet, if the supporting of this verdict be of no more ill consequence than in point of costs, and the party has another remedy left him, then I am of opinion that the party ought to suffer for the neglect of his * counsel. But if the verdict binds and concludes the right of the party, then I think it hard that the party should lose his right, by a mistake, or slip of the counsel.

* P. 203.

Powys senior: It would be of vast inconvenience if the bare stirring of a point at *Nisi prius*, and which for ought appears, neither judge, counsel or jury thought upon more, should be a ground for granting a new trial; for it may be, the reason why it was not insisted upon by the counsel was, because they knew the other side had evidence, that would give it a full answer, by quise altering the fact. What happens now accidentally, may hereafter happen designedly; matter may be slid in by the counsel, and then dropped only in order to move for a new trial; and it is better to suffer a particular inconvenience, than open the way to a general mischief.

Eyre

Hilary Term 12 Ann.

Eyre: Mistake of judge or jury a good cause of granting a new trial, but never yet heard, that the mistake of the counsel was so. The counsel stands in the place of his client; and therefore, if the counsel waive a point, it is the same as if the client did it himself.

Mistake of judge or jury a good cause for granting a new trial, but not the mistake of counsel.

Powys junior: If a defendant, in an action of debt upon a bond, who has a good defence upon the merits, should, by advice of counsel, hazard his cause upon a demurrer, which is adjudged against him, this mistake of counsel would not be allowed in Chancery as a good cause of relief.

In debt upon a bond, if the defendant, who has a good defence upon the merits, should hazard his cause upon a demurrer, he can have no relief afterwards.

Parker Chief Justice: There must be no new trial. And I so far assent to my brothers, that though a verdict should leave the party remediless, yet if the counsel does not only, not insist, but expressly waive it, that then there ought to be no new trial.

* Barnardiston and Foulyer. B. R.

* P. 204.

CHIEF Justice *Parker* delivered the resolution of the court.

Award.

The points in this case two:

1st, Whether the award be a good award? And,

2^{dly}, Whether the breach be well assigned?

As to the 1st, We are of opinion, that the award is a void award, though it was not insisted upon by the counsel; and that for this reason:

1st Point.

The award was made the 23^d of June, and the award orders so much rent, which by the award itself appeared not to be due until the 24th, to be paid by A. to B. in satisfaction of six pounds, which the arbitrators did judge to be owing to B. Now this rent being due upon a day subsequent to the award, that the clause in the award concerning it was void, 1 *Rel. Abr.* 145. pl. 8. is an express authority. And the reason is plain, viz. because the rent may become extinct, either by surrender, or eviction, before it is due.

And this clause being void, the whole award becomes void too; for though an award may be void in part, and good for the rest; yet this must not be when it is void in that part, that concerns the justice of the award, which is the case here; for if mutual releases are to be given, though the rent be not paid according to the award, B. will be without remedy for that money which the arbitrators acknowledge to be due to him. *Saunders* 292. 2 *Cre.* 584.

Ante 201.

But 2^{dly}, Supposing this to be a good award, we are of opinion, that the breach is not well assigned; for the submission being of all suits, &c. between A. and B. and the award pursuing the very words of the submission, viz. that all suits, &c. between A. and B.

2^d Point.

VOL. X.

N n

should

Hilary Term 12 Ann.

* P. 205. should cease, * it is evident that neither the parties to the award, nor the arbitrators, did design the former that their submission, or the latter that their award should extend to suits depending between *A.* and *B.* and others. But be the intention of the parties what it will, the law is plain, that the prosecution of a suit between *A.* and *B.* and others, is no breach of such an award. 1 *Rolle's Abr.* 246. case of *Brockas* and *Sir John Savage*, a much stronger case; because husband and wife, are to many purposes in law, considered as one person.

A *certiorari* to return the record of a suit between *A.* and *B.* return of a record between *A.* and *B.* and *C.* the record not removed. *Salk.* 146. *Mich.* 12 *Gulielmi*, indictment in this court, *Brown's* case. The same law as to orders. Judgment *pro def.*

Cases quoted *arguendo*, 2 *Mod.* 227. *Green* and *Stanford.* 2 *Rich.* 3. 18. 1 *Rolle's Abr.* 261. 2 *Rolle's Abr.* 412. 20 *H.* 6. 41. *Gle* and *Rell* 1704. affirmed in the house of Lords.

Aubry and Fortescue. B. R.

Assumpsit.

PLAINTIFF declares, that the defendant being indebted to the plaintiff, *pro opere & labore, &c.* promised him on the 1st of April to pay him the money upon the 1st of May, &c. The defendant pleads in bar, *non assumpsit infra sex annos*; plaintiff replies, that he was beyond sea at the time the action accrued, and that the action was begun within six years *post reditum*; upon which defendant demurs, and plaintiff joins in demurrer.

* P. 206. For the plaintiff, *Turnor's* case, 8 *Rep.* 132. was quoted, that if the bar be bad in substance, and that there is a replication only to avoid the bar, which replication is vitious, * and to this replication the defendant demurs, yet the plaintiff must have his judgment, because though the replication be naught, yet not being to inforce the cause of action, but to avoid the bar, which is bad in substance, (for the bar should have been *actio non accrevit*, and not *non assumpsit*) it is no prejudice to the plaintiff.

Ante 104.

Statute of limitations.

What was most materially insisted upon for the defendant was, that the whole record was, what the court were to found their judgment upon; that therefore if it appeared upon the whole record that the plaintiff had no cause of action, whether by reason of declaration, bar, replication, &c. (not material which) the plaintiff could never have judgment. And here the plaintiff by his own replication had quite destroyed his cause of action, for he did admit, that he had not brought his action within six years after the cause of action accrued, but took sanctuary in the saving clause of the statute of limitations.

Hilary Term 12 Ann.

tations. The question therefore was, whether the matter set forth in his replication, does bring him within the saving clause of the act.

Actions of *assumpsit* not mentioned in the saving clause; and consequently it is plain that the plaintiff is not intitled to the benefit of the saving, by the letter of it.

And that the saving in the statute of limitations is not to be extended, according to equity, the resolution in *Bynion's* case, that the shutting up of courts *tempore Guerra*, does not likewise fall under the saving (a resolution often approved of by Chief Justice *Holt*) is an express authority: Salk. 420, 422.

Court strongly of opinion *pro quer.* Sed *Adjournatur.*

* *Univerſity of Cambridge verſus Archbiſhop of York*, * P. 207.
or *Vayalor and Crofts.* B. R.

THIS was a writ of error, out of the court of C. B. upon a *quare impedit* brought by the chancellor and ſcholars of the univerſity of Cambridge, againſt the archbiſhop, &c. founded upon the ſtatute of *tertio Jacobi 1. cap. 5.* which diſables popiſh recusants convicted, from preſenting, &c. and veſts ſuch preſentations in the chancellor and ſcholars of the two univerſities reſpectively. 8 Mod. 148. Quare impedit.

The questions upon this caſe were two

First of all, Whether the defendant, his plea in abatement, viz. 1st Point, that the univerſity of Cambridge were incorporated by the name of chancellor, maſters and ſcholars, &c. and that therefore they had ſued by a wrong name, were a good plea; for if ſo, the court of C. B. erred in awarding a *reſpondeat ouſter*.

It was inſiſted in behalf of plaintiff in error, that it was a good plea in abatement; and for this purpoſe were cited 4 Ed. 4. 7. 22 Ed. 4. 34. 13 H. 7. 14. name of a corporation compared to the name of baptiſm, *Fitzberbert Abr. tit. Devife, placito 27.* For the plaintiff in error.

It was argued by Serjeant *Cheſbyre* for defendant in error, that a corporation may have one name by which they may take, and another by which they may ſue. 1 Rolle's Abr. 513. therefore *non ſequitur*, that, becauſe the univerſity was incorporated by this name, they cannot be impleaded, or ſue by another. For the defendant in error.

He argued, that the act of parliament, veſting this right in them by the name of chancellor and ſcholars, was an incorporating of them by that name, *quoad* this particular * purpoſe. This, he ſaid, could be done by letters patent, 2 H. 7. 13. 4 Leon. 190. a *fortiori* by act * P. 208.

Hilary Term 12 Ann.

act of parliament; and if this should be so, then the very act of parliament is a falsification of the plea.

Co. Lit. 303. a. A plea in abatement must be certain to every intent.

It was said likewise, that there was another rule as to pleas in abatement, viz. That the defendant must never set aside the writ of the plaintiff, without shewing a better.

He insisted lastly, that this variance was not a material one, because a man by becoming master, does not cease to be a scholar.

The reply.

To this it was replied, by the counsel for the plaintiff in error, that if the case were really so, that the university of Cambridge had one name to take, and another to sue by, this ought to have been shewn by the other side. That the act of parliament operated only by way of *descriptio personæ*, as in a devise, and not by way of incorporating them.

That admitting this statute did incorporate them, as to this purpose, by the name, &c. yet the acceptance of a new charter by another name, made it necessary for them to sue by that name.

Court.

Parker Chief Justice: The declaration sets forth the act of parliament, as an authority to sue by that name, which puts it upon the defendant to shew some special matter to avoid it, as the acceptance of another charter by another name, subsequent to the act.

Powys senior: Chancellor and scholars is such a name as comprehends the whole university, for it includes both head and members.

Eyre and Powys junior: *Non sequitur*, that what will be sufficient to amount to a *descriptio personæ* to enable a person to take, will be sufficient for him to sue in.

* P. 209.
2d Point.

* The second question in this case was, that the university of Cambridge had not sufficiently pleaded the conviction for want of *ideo convictus est*.

But to this it was answered, that the record of the default was a conviction of itself; and therefore the special conclusion of *ideo convictus est* superfluous and unnecessary.

And to this opinion the court inclined.

This last question depended upon *stat. 1 W. & M. sess. 1. cap. 26. Adjournatur.*

-Parker

Hilary Term 12 Ann.

Parker and Langly. B. R.

CHIEF Justice *Parker* delivered the resolution of the court to be, that the declaration was naught, for want of shewing what became of the former action; whereas it ought to have been shewn, that *that* was false and hopeless.

As the declaration now stands, the first suit may either, 1st, Be determined; or 2^{dly}, It may be deserted; or 3^{dly}, It may be still regularly going on; & *non constat*, which of these three is the matter of fact.

If the 1st, *non constat* whether determined for or against the plaintiff; if for the plaintiff, then there is no colour for this action.

If the 2^d were the matter of fact, desertion is an indication of its being false and hopeless, and then indeed this action would be maintainable; and for this purpose there is a very strong case in *W. Jones* 93.

If the 3^d be the matter of fact, then the action is brought too soon. 2 *Rich.* 3. 9. Held by all the Judges, that the first action must be first determined, because *non intelligitur*, says the book, *quousque terminetur*, that the action was unjust. *Dyer* 285. *Hobart* 267.

No man can say of an action still depending, that it is false or malicious. The same rule holds in criminal cases. * *Yelverton* 116. * P. 210. *Siderfin* 15. 1 *Saunders* 228. 2 *Keble* 476. In an action for a malicious indictment, the plaintiff must in his declaration shew what became of the indictment.

A verdict, or a plea in bar, admitting and confessing the first action to be false and hopeless, may cure this defect in a declaration. *Raym.* 418. 2 *Keble* 456, 753. 3 *Keble* 781.

The admitting this declaration to be good, notwithstanding this omission, would introduce great absurdities, viz. inconsistent and incongruous verdicts in different actions.

Indeed, if the first action goes off by nonsuit, it may be said, that in another action brought for the same cause, there may be a verdict given inconsistent with the verdict given in the present cause: this may be, but the possibility of such a verdict in a future, and not existing action, shall not hinder a man from bringing such an action as this. The entries uphold this opinion. *Ashton* 40. *Brownlow Redivivus* 61. *Robinson* 91. Judgment given *pro def.*

Obiter dictum by the Chief Justice in this resolution, that where the title is of one sort of action, *there* the declaration can never change it to another; but it may make a fatal variance between the writ and the declaration. 1 *Ventris* 19. 2 *Rolle's Rep.* 49.

See ante 145.
Action upon
case for mali-
cious prosecu-
tion, and upon
demurrer,
judgment pro
def. because
plaintiff had
not in his de-
claration
shewn what
became of the
malicious
prosecution.

Salk. 15.

* P. 210.

Hilary Term 12 Ann.

See ante 192.

Johnson and Altham. B. R.

Pleading.

CHIEF Justice Parker delivered the resolution of the court to be, That the judgment of the court of C. B. should be affirmed.

Petit judicium de billa, the form of pleading in abatement.

* P. 211. * *Petit judicium de narratione*, form of pleading in bar.

Demanding judgment of the declaration, is understood to be demanding judgment of the case in the declaration.

The demanding judgment of the bill, is as much as to say, since the declaration is your case, which it is always supposed to be, you have brought a wrong bill.

In this case, there being no bill upon the file, and the declaration being the very first step in the cause (which undoubtedly is erroneous, for every cause must begin either by writ or bill) neither of these two forms of pleading were proper: not *petit judicium de billa*, for there was none; not *judicium de narratione*, for it was not the case in the declaration, but want of a bill that was the error. The defendant therefore in the original action should have concluded his plea thus, *petit judicium si respondere compelli debeat*.

See post. 296.

Queen and Blagden. B. R.

Information
in nature of a
quo warranto.

THIS was an information, in nature of a *quo warranto*, against the defendant, to know by what authority Blagden exercised the office of Port-reve in the borough of Honiton.

The defendant in his bar, sets forth his right to that office; and concludes with a traverse, *absque hoc* that the defendant usurped the office. The crown in its replication, taking no notice of the special title set forth by the defendant, joins issue upon the traverse *quod usurpavit*, &c. and upon this demurrer is joined.

Powys junior: I ever took it, that in this case, the *absque hoc*, &c. was but meer matter of form, and a respectful way of concluding the plea.

* P. 212. * Parker Chief Justice: The question turns upon this, whether the traverse be only matter of form? for if so, the crown cannot take issue upon it; but if it be a material part of the plea, most certainly the crown may do it. See post. 296.

Queen

Hilary Term 12 Ann.

Queen and Green. B. R.

THE court was moved to quash a conviction upon the statute 8 Anne, against a baker, for selling of bread.

Exceptions to
a conviction.
2 St. Tr. 756.
3 St. Tr. 576.
1st Exception.

Exceptions taken to the conviction were, that here it appears upon the conviction, that information was given the 8th day, of an offence done upon the 5th; and the act of parliament requires the information to be given in three days after the offence committed.

Parker Chief Justice: Not settled, whether the time in this act of parliament is to be taken inclusively, or exclusively; for the law allows no fraction of a day. Generally computation of time in penal laws, is taken inclusively.

Eyre: This a point never settled.

Powys senior was of opinion, that the three days were to be reckoned exclusively.

Another exception was taken, that the conviction sets forth the bread to be bought *apud domum mansionalem sive shopam* of the baker, situate in the parish of *St. Sepulchre*, in *Com. Midd. infra jurisdictionem* of the justices. It was said that it was uncertain whether the bread * was bought at the shop or the house, and uncertain which * P. 213. of the two were situate in *Com. Midd. infra, &c.* and consequently uncertain whether the justices had jurisdiction?

Powys senior: Both house and shop must be situate, &c. for the word *situate* plainly relates to both.

Then it was objected to the conviction, that the conviction sets forth, that being *debite summonitus*, and not appearing, they proceeded, &c. whereas natural justice requires, that the defendant should have had a reasonable time allowed him for the making his defence.

Parker Chief Justice: This is a material objection: not said that he was summoned to appear at a certain time, or any time, or when the summons was made.

Powys junior: To be considered, Whether, when it is said that he was *debite summonitus*, the word *debite* does not import all reasonable circumstances relating to that summons; and I am of opinion it does.

Hilary Term 12 Ann.

4th Exception.
Witness sworn
de veritate
præmissorum
not sufficient
in convictions,
because it does
not appear
what his evi-
dence was.
(But oath
made de veri-
tate præmissorum
sufficient.
Salk. 369.)

Another objection to the conviction was, that the evidence upon which he was convicted is not set forth. Said indeed that the witness was sworn *de veritate præmissorum*; but it does not appear what the answer of the witness was. It is indeed said, that it did appear, from what was sworn to the justice, that he was guilty; but it ought to have appeared so to the court, from the nature of the evidence, specially set forth.

And of this opinion was the court.

Eyre: There may be another exception taken to the conviction; for I am very doubtful, whether a justice of peace could, by this statute, upon default proceed to judgment.

Conviction quashed *nisi*.

* P. 214.
Salk. 428.
Regina ver.
Barret,
Salk. 383.

* That appearance supplies want of summons, these cases quoted, *Mich. 8 Gulielmi, Mayor and Burgesses of Wilton. Queen and King, Mich. 10 Anna.*

Ante 148.

Jones and Gwynn. B. R.

Action upon
the case for a
malicious in-
dictment.

THIS was an action upon the case, wherein the plaintiff declares, that he had always maintained a good and honest character among his neighbours, and that he got his livelihood by exercising *legitimo modo* the faculty of a badger of corn or grain. That the defendant *præmissorum non ignarus, sed malitiose intendens, &c.* caused him to be indicted for exercising the trade of a badger, without a licence, *contra formam statuti*.

Upon this declaration there is a joinder in demurrer.

And *Parker* Chief Justice delivered the resolution of the court, that judgment should be given for the plaintiff.

1st Exception
to the decla-
ration.

Exceptions taken to the declaration were four; and the first and most material one was, that the indictment was declared only to be brought *falso & malitiose*, but not *absque rationabili & probabili causa*.

Answer.
Though an
action upon
the case for a
malicious in-
dictment can-
not be sup-
ported unless the indictment was groundless and without a probable cause, yet these very words *absque ratio-*
nabili & probabili causa, not always necessary to be used.

To this I say, this action cannot indeed be supported, unless the indictment was groundless and without a probable cause; yet no one authority cited to prove these very words necessary to be used. Many authorities wherein they are wanting. *Cro. Jac. 193. 1 Rolle's Abr. 113, &c.*

If averment of the plaintiff's honesty, &c. and that the defendant *præmissorum non ignarus*, will import these words, then here they are.

Hilary Term 12 Ann.

* But the true answer to this objection is, that the word *malitiose*, * P. 215. implies it to be *absque rationabili & probabili causa*, and a great deal more. Import of the word malice.

Malitia is an abstract of *Malus*, which imports what is wicked, and can admit of no possibility of excuse. Among the *Romans* it signified a mixture of hatred and fraud, and what was utterly repugnant to simplicity and honesty. Thus it is defined by *Cicero* in his 3d book *de Natura Deorum*; and in his 3d book of *Offices*.

Thus it is used in the civil law, and thus in our's. What we call *malice implied*, is murder attended with such circumstances as can admit of no excuse.

My Lord *Coke* in his exposition of *stat. West. 2. cap. 12.* says, Stat. Westm. 2. c. 12. that an appeal brought *per malitiam*, is an appeal that wants a foundation, and is groundless.

In conspiracy, these words are used, *Stamford Pl. Coron. 172. B.* Indictment of a man, for what a civil action might have been brought, imports malice. *2 Mod. 306.*

2d Exception to the declaration was, that the plaintiff had not averred, that he was licensed to exercise the trade. 2d Exception.

Answer. This had been neither necessary nor proper. But he has said enough, *viz.* That *legitimo modo* he exercised the trade of a badger. Answer.

3d Exception to the declaration was, that it was not said, that he was acquitted by verdict. 3d Exception:

The Answer is, That the word *acquietatus* imports acquittal by verdict. Answer.

4th Exception to the declaration was, that the prosecution of this indictment could not be a malicious one, because the plaintiff in his very replication, has confessed that which was a probable cause for it, *viz.* the using the trade of a badger. 4th Exception.

* To this it may be answered, that this is no probable cause; * P. 216. for it is not the exercise of the trade, but doing it without a licence, that constitutes the crime. Answer.

And now I come to the matter in law, *viz.* That the exercising the trade of a badger, not being, &c. is not an offence indictable; and if so, it is said, the action is not maintainable. Point in law.

The force and strength of this objection may be resolved into the six following points:

1st, Acquittal upon an insufficient indictment, will not intitle a man to the plea of *autrefois* acquitted, to another indictment for the same offence.

2dly, That conspiracy lies not were the indictment was insufficient.

Hilary Term 12 Ann.

3dly, That conspiracy lies not but for such an indictment, upon which the defendant was so acquitted, as that he may plead his acquittal in bar of another indictment.

4thly, By a parity of reason, it may be inferred, that an action upon the case will not lie likewise, upon an indictment for a matter not indictable; and upon which consequently, there could not be such an acquittal as could be pleaded in bar of another indictment.

5thly, Where the matter of the indictment, though it be not indictable, is infamous and scandalous, an action upon the case will lie. *Contra* where the indictment contains matter neither indictable nor scandalous.

6thly, This action lies not, because upon this indictment the party was never in danger; for judgment could not possibly be given against him.

I shall meet with all these points, in speaking to the four following propositions.

1st, That to the supporting of this action, it is not at all material, whether the indictment were sufficient, or insufficient.

* P. 217. * 2dly, That there can be no argument drawn from a parity of reason, between actions of conspiracy and actions upon the case.

3dly, That there is no foundation for such a distinction, as where the matter of the indictment is scandalous, and where it is not.

4thly, That the party's being in danger, or not in danger upon the indictment, is not at all material.

Action upon the case lies for a malicious indictment, though an insufficient one.

As to the 1st point, viz. That the sufficiency or insufficiency of the indictment is not at all material to the supporting this action.

It is to be considered what the grounds of this action are; and these are two:

Upon the plaintiff's side, *innocence*.

Upon the defendant's, *malice*.

Salk. 13.

The damage a person may sustain by an indictment, may relate either to his person, his reputation, or his property; and each of these resolved to be a just ground of this action, in the case of *Savil* and *Roberts*; and damage in the last respect, viz. Property, there looked upon as strong as any.

Case of Chamberlayne and Prescot denied to be law.

It is true, that in *Raymond* 135. in the case of *Chamberlain* and *Prescot*, there is a resolution not so agreeable with that of *Savil* and *Roberts*, which yet the late Chief Justice *Holt*, in his excellent argument, upon the case of *Savil* and *Roberts*, where he gives the resolution of the court, seems unwilling to deny to be law, though he might.

I own

Hilary Term 12 Ann.

I own my opinion to have been, at first, that where the indictment was neither scandalous, nor sufficient, this action would not lie, but upon further consideration have changed my mind. See p. 149.

For imprisonment, vexation, expence, the same upon * a ground- * P. 218.
less and insufficient indictment, as a good one.

For quashing an indictment, is not always in a man's power; demurring is hazardous, and what a man in prudence would not do, when he is sure of being cleared by a verdict. And if upon a demurrer there be any difficulty, it is equally expensive with an acquittal upon verdict.

But it is the expence, not the *quantum* of the expence, which is material. *1 Cro. 291. 3 Edw. 3. fo. 19.*

And as the plaintiff is equally damaged by an insufficient, as sufficient indictment; so the malice of the defendant is not at all less because the matter was not indictable, nay it is rather an aggravation. *1 Rolle's Abr. 112.*

The only *remora* to those actions, is the fear of discouraging just prosecutions; but to this, malice is a full and sufficient answer. The fear of discouraging just prosecutions no good objection.

3 Cro. 563. Raym. 135. Certainly not reasonable, that more favour should be shewed to a bad indictment than a good one.

It ought to be considered, that a small slip vitiates an indictment; and if that shall protect a man from an action, a way is opened for the malicious to ruin the innocent; for how easily may a slip be made on purpose?

To the cases cited in maintenance of the objection, I answer, that one is *9 Edw. 4. 12.* an action of conspiracy; and there I allow the law to be so. The other is *1 Rolle's Abr. 110.* which is indeed a case to the purpose; but then I observe, that the foundation of the resolution is built upon the parity of reason, that was supposed to be between conspiracy and this action now before us.

And therefore I come now to my *ad point*, viz. to shew, that there is no arguing from one sort of actions to the other. Case and conspiracy so different, that

there is no arguing from one sort of actions to the other.

* Actions of conspiracy, the worst sort of actions in the world * P. 219.
to be argued from; for more contrariety and repugnancy of opinions in them, than in any other species of actions whatever. Greater difference of opinions about

actions of conspiracy than any other.

I readily admit, that unless the indictment be either determined, Case for malicious indictment not
or deserted, this action is not maintainable. *Yelverton 116.*

maintainable unless the indictment be determined or deserted.

Conspiracy

Hilary Term 12 Ann.

Conspiracy lies not without acquittal; and the reason of this, and the only one is, because this is a formed action, and the form of the writ in the Register is so. 17 *Edw.* 2. 509. *Register* 134. b. 9 *Rep.* 56. b. 2 *Cro.* 130. 1 *Rolle's Abr.* 114. A notable case reported *W. Jones* 94. and 1 *Cro.* 15. and likewise 1 *Rolle's Abr.* 112. where several good distinctions taken between case and conspiracy.

Action upon the case not tied to any form. Certainly no arguing from an action which is a formed one, for which there is a formal writ in the *Register*, to an action upon the case, that is tied down to no form at all.

Will lie upon an indictment where there can be no acquittal. If an action upon the case be brought upon an indictment, where the jury find *ignoramus*, there is no possibility that there can be an acquittal. 2 *Cro.* 190. 1 *Rolle's Abr.* 114. 3. 2 *Cro.* 490. *Palmer* 44, 45. *Styles* 10. *Raym.* 180. *Similiter* where indictment *coram non judice*, *Styles* 372, 378. *Similiter* where an indictment is insufficient, and goes off on that account. 2 *Cro.* 32. *Yelverton* 46. *Styles* 372, 157. 3 *Keble* 141.

No difference whether the matter of the indictment be scandalous or not. 3d Proposition was, that there was no reason for making a difference, when the matter of the indictment is scandalous; and when not.

The cases before mentioned, speak not a word of this difference; and if scandal is mentioned, it is only mentioned in the nature of damage. *W. Jones* 93. *Styles* 378.

* P. 220. * 4th Proposition was, that the danger of the party was not material.

Not the danger but the expence of the party indicted, ground of damage. 1. Not danger, but expence, ground of damage. 2. All the danger in this case, if the indictment had been good, would only have been incurring a fine; & *antea ostensum*, the quantum of the damage not material.

3. When upon an indictment *ignoramus* is returned, or when the indictment is *coram non judice*, the party is in no danger at all, yet this action lies. Judgment *pro quer.*

Queen and Inhabitants of Manchester.

Sett. and Rem. 21. **M**OVED to quash an order of justices for the payment of two shillings *per week*, until further order, to *H.* for the relief of herself and four poor children.

Order of justices for relief of H. and four poor children quashed, because not expressed that H. was indigent. The 1st Exception was, that the order did not set forth that *H.* was indigent, which is the very foundation of the justices jurisdiction; and for this reason quashed.

Hilary Term 12 Ann.

There was another fault in the order, viz. That the money was made payable until further order, whereas it should have been during her poverty. Order to pay money for the relief of a poor person until further order, ill. Sed vide contra Salk. 534.

Judge Eyre: Had this been an order for settlement, the not naming the children had been a fault. Order for settlement of H. and children, too general. Salk. 488. 1 Mod. Cases in Law and Equity 337.

* P. 221.

* Queen and Dunn, or Parishes of Halifax and Overton in the West Riding of Yorkshire. B. R.

AN order made upon the father-in-law, for maintaining the widow of the son, quashed; because not set forth in the order, that the father was of sufficient ability, in which case only the act enables the justices, &c. Order of justices upon H. to maintain his son's widow quashed, because not expressed that he was of sufficient ability.

* Easter Term

* P. 222.

13 Annæ. B. R.

Turner and Goodwin.

See ante 153, 189.

MR. Salkeld pro def. Mr. Reeves pro quer.

It was agreed on both hands, that the question was no more than this, Who was obliged to do the first act; for if the judgment was to be assigned before payment of the money, then judgment must be for the defendant; but if, &c.

For the defendant it was said, that these acts of paying the money, and assigning the judgment, were alternate acts, which cannot go on *æquis passibus*, but there must be a priority in law. Argument for the defendant.

That in law, proper and formal words of condition are not required either in wills, grants, or contracts.

Not in wills; *Cro. Eliz.* 46, 454. 2 Rolle's Rep. 68.

VOL. X.

Qq

Not

Easter Term 13 Ann.

Not in grants; 1 *Inst.* 204. grant of an annuity *pro consilio impendendo*. The reason assigned by Coke, not a good one; but the true reason is, that the law implies * a condition, because else there would be no remedy. 5 *Rep.* 78. *Gray's case*.

The case chiefly relied upon for the defendant was 14 *H.* 4. *pl.* 19. which was debt upon bond, conditioned, that if the defendant resigned his living by such a time, for a certain pension to be conveyed to the parson, then, &c.

Argument for the plaintiff. For the plaintiff it was urged, that the words *assigning the judgment* did not make a condition precedent, from the necessary import of the words; and to shew this several authorities were quoted, where this way of expression was used, and yet not held a condition precedent. 3 *Cro.* 204, 454, 146. 2 *Rol.* 68. *T. Jones* 205, 206.

Object. 1. *Object.* 1. Condition of a bond always to be taken in that sense that is most favourable to the obligor, which is that this should be a precedent condition.

Answer. *Answer.* This rule generally true, but not always. 5 *Rep.* 23. b. 1 *Vent.* 255. 2 *H.* 7. 8, 9.

Object. 2. *Object.* 2. If the money must be first paid, the defendant is without remedy for the judgment.

Answer. *Answer.* No, for the plaintiff in that case becomes a trustee to the defendant for the judgment; the assigning of the judgment, being only a deed to manifest that trust. (But to this it was replied, that this was not a remedy in law, but equity.)

1 *Mod.* 113. Assigning over a *chose in action*, interpreted as a covenant against the assignor; and therefore if the money be paid, and no judgment assigned, it is a breach of covenant.

In case of a mortgage, money is always paid first.

This assignment must make mention of the money as paid first; since otherwise it will want a good consideration, and be void, for it will be maintenance. 3 *Leon.* 234. *Noy* 52. 3 *Cro.* 552, 170.

* P. 224. 34 *H.* 6. 30. *Bro. Main.* 8. 1 *Bullst.* * 187. (To this it was answered, that the assignment need not recite the money as paid, but only the bond and the special agreement.)

Lastly, this distinction was offered by the counsel for the plaintiff, in answer to several cases, that if by the agreement of parties two acts are to be done, and time is limited for the doing of one, and no time for the other; there if the nature of the thing will bear it, that thing is to be done first for which the time was limited.

1 *Ventris* 147. 1 *Saunders* 319. 1 *Lutwyche* 251. 1 *Cro.* 384, 5. 2 *Saunders* 350, 352. 1 *Lutwyche* 490, 565.

Afterwards, in next term, judgment was given for the plaintiff.

Easter Term 13 Ann.

Timber and Gardiner. B. R.

ACTION upon the case for several promises; defendant pleads, Assumpsit, Action upon the case. that he gave the plaintiff such a quantity of, &c. and the plaintiff accepted it in full satisfaction of the said promises. Plaintiff demurs, and defendant joins in demurrer.

It was insisted for the plaintiff, that the defendant's plea was naught, because not said that the defendant gave it in satisfaction. *5 Co. Rep. 117.*

Court: If the defendant gave it with one intention, and the plaintiff accepted it with another, the intention of the donor must prevail; but the question here is, whether the words *full satisfaction*, shall not as well relate to the verb *give*, as the verb *accept*; especially because of the conjunction *et*, which seems to difference it from the case mentioned. *Adjournatur.*

* Shiply and Shiply. B. R.

* P. 225.

A Writ of *Dower* is brought in the court of Common Pleas; the defendant pleads, *quoad* all the lands lying in the vill of B. a bar by reason of a fine levied; as to all the lands lying in the vill of C. besides 24 acres, a bar by release; and as to those 24 acres in C. the defendant pleads non-tenure. Writ of dower.

The demandant in her replication admits, that as to all the acres, besides the 24, the fine and the release are sufficient bars, and joins issue upon the non-tenure. A verdict is found for the demandant, and judgment given for the demandant as to the 24 acres; and as to the rest, the judgment was, that the demandant *pro falso clamore suo sit inde in misericordia, &c.* and that the defendant *eat inde sine die, &c.*

Upon error brought of this judgment in B. R. it was insisted upon, that the judgment itself was erroneous for want of a *nil capiat per breve*; and for this was cited *8 Co. Rep. 62. Co. Entries 320, 323, 326. 2 Cro. 284.*

In answer to this, it was urged by counsel for defendant in error, that if this were a good cause to reverse the judgment, it would shake the authority of a thousand judgments; cases being endless, where the words *nil capiat per breve* are omitted, *Townshend 1st book of Judgments 53, 54. Co. Ent. 657. Rastall's Entries 654, 677.* And then it was insisted upon, that if this were a fault, it would be aided by *16 & 17 Car. 2. cap. 8.* where are these words, *and all other matters of like nature.*

Court:

Easter Term 13 Ann.

Salk. 262,
401.

Court: The utmost consequence of this objection is, that we must give the same judgment that the court of Common Pleas ought to have done.

* P. 226.

* It was objected by the counsel for the defendant in error, that the writ of error was so general and uncertain, that the court could not say the record was before them; for there being several sorts of dower, and this writ of error being only *dotis* generally, it was uncertain what record the writ of error was to remove.

It was objected likewise, that the writ of error should have set forth the vill. *Co. En.* 248.

But these objections were over-ruled, as being of that nature as if it was necessary for the whole declaration to be set forth in the writ of error.

In debt, though there are several sorts of debt, the writ of error is *de placito debiti*, without saying more, whether bond, &c. 2 *Saunders* 43, 328. So in trespass, the writ of error is *de placito transgressi*, and yet several trespasses.

The principal point insisted upon for the plaintiff in error was, the want of abridgment. It was said, that if the lands out of which dower was demanded had been all in one vill, and it had appeared by the demandant's own confession, that the demandant had made too large a demand, in that case the demandant ought to abridge her own demand: but if the land lies in two vill, then this abridgment is not permitted; but the writ must abate for making too large a demand. But granting that an abridgment of the demand may be permitted, where land lies in two vill, (as *Fitzherbert Plaint*, pl. 17. seems to allow) yet the judgment was erroneous, because here is no abridgment. 14 *H. 6.* fol. 3, 4. 9 *H. 6.* 43. a. 19 *H. 6.* 13. 7 *Ed. 3.* fo. 10. *Rastall* 232. a. b. 234. b. *Robinson's Entries* 281.

Hob. 273.

Judgment given in court of Common Pleas was affirmed *nisi*; and the Earl of *Clanrickard's* case relied upon, as a case in point.

* P. 227.

* *African Company versus Mason.* B. R.

Debt upon
bond.

Pleading.

DEBT upon bond; upon *oyer* of the bond the condition of the bond appeared to be, that *Mason* should be factor for the company at *Bristol*, and should behave himself faithfully in that and all affairs he should be employed in by the company; and should, when required, pay to the use of the company, all the sums of money in his hands and in his possession, received by him for the company. The defendant pleads performance of the condition generally.

The

Easter Term 13 Ann.

The plaintiff in his replication assigns for breach, that the defendant, after the making of the said bond, and before the bringing of the action, did at *London* receive of *Jacob Reynolds* and divers others, for the use of the company, several sums of money to the value of 376*l.* and that he was requested to pay this money, and had not paid it. The defendant demurs.

Breach assigned.

It was objected to the replication;

1st, That to say the defendant received several sums of *Jacob Reynolds* and others to the value of 376*l.* was uncertain and double. Indeed in covenant, because the party is to recover damages in proportion to the damages assigned by the breach, and to prevent prolixity, such a way of pleading is permitted; *contra* in a bond, because if the plaintiff had assigned but one particular sum, how small soever, the whole penalty of the bond is forfeited. *Brigstock and Stannian*, 8 King *William* in *C. B.*

1st Objection. In debt on bond to perform covenants, the breach assigned in the replication must be certain and single, but *contra* in action of covenant. Salk. 140.

2^d Objection was, that the replication was not within the condition of the bond; for the receipt was by the condition to be at *Bristol*, and the receiving was in the replication set forth to be at *London*, and not said to be received upon account of the affair of *Bristol*.

2^d Objection.

* 3^{dly}, Not set forth in the breach, that the money, when demanded, was in his hands and possession.

* P. 228. 3^d Objection.

4^{thly}, Not said, that he was employed to receive the money.

4th Objection.

For the plaintiff it was insisted that the breach was well assigned; for in breaches of a complicated nature, such a general kind of assignment allowed. 1 *Levinz* 94. *Lutwyche Entries* 580. *Mich. 4 Anna*, *Chambers* and *Priestland*.

For the plaintiff.

Anciently no allowance made to avoid prolixity in pleading, and therefore performance generally was not allowed; but this was altered in *Queen Elizabeth's* time, where pleading as general as this allowed. *Cro. Eliz.* 253, 749, 916.

The breach assigned is single; for the not paying when required is the breach, the receiving, &c. but matter of inducement.

The plaintiff perceiving the opinion of the court to be strongly against him, especially upon the 1st and 3^d objections, obtained leave to discontinue, upon the payment of costs.

Plaintiff obtained leave to discontinue upon payment of costs.

* *Muston and Yateman*. B. R.

* *Muston*. See post. 300.

THIS was an action of trespass: the defendant pleads, that Sir *Thomas Freke* was seised of a place called *Ten Acres*, and demised the same to the defendant for 99 years; and that Sir *Thomas Freke*, and all those whose estate he had, did time out of mind use

Trespass.

Justification.

VOL. X,

R r

such

Easter Term 13 Ann.

such a way, &c. Plaintiff replies *de injuria sua propria absque hoc quod prædictus Thomas Freke*, and all those whose estate he had, did time out of mind, &c. Upon this issue joined, and jury find that Sir Thomas Freke, * and all those whose estate he had, did time out of mind, &c.

* P. 229.

Motion in arrest of judgment.

Every man's plea shall be taken strongest against himself.

Hob. 234. 242.

It was moved in arrest of judgment, that the justification was naught, because it was *seisitus* generally, and the estate not set forth of which he was seised, whether life, tail, or fee; and that therefore, since every man's plea is to be taken in that sense, that is most prejudicial to the pleader, (because in law a man is always presumed to make the best of his own case) by *seisitus* here must be intended a seisin for life, which will not support prescription. This objection was also turned another way, *viz.* That this plea was naught for the uncertainty; it might be a seisin for life, tail, or in fee.

Econtra.

It was urged in support of the plea, that the jury could not possibly have found the verdict they gave, unless it had been a seisin in fee; and several cases were quoted to shew, that a verdict cures all defects where it was possible for the verdict to have been given, unless *that* had appeared which was wanting in the pleading. *Hutton* 54. *Sir Tho. Jones's Rep.* 132. *Raym.* 487. 1 *Levinz* 308.

Court.

Parker Chief Justice: It must have been given in evidence that he was seised in fee; for he that has an estate only for life, has no body's estate but his own; and then impossible for the jury to find, as they have done, *viz.* That Sir Thomas Freke, and all those whose estate he had, did, &c.

Eyre Judge: Seised *de feodo*, always the form of pleading; and therefore necessary. Whether the verdict has cured it, I cannot say.

* P. 230. * *Pouys junior*: Prescription for the way, the only matter in issue; the seisin only inducement, and passed over at *Nisi prius*.

Where defects in pleading are cured by the verdict.

Chief Justice *Parker*: The only question is, whether the issue be a material issue; for if it be, then by express words of the act, all defects in pleading cured by the verdict. *Adjournatur. Vide post. Pasch. 1 Geo. 1.*

Roper

Roper versus Radcliffe. In the House of Lords.

See this case
9 Mod. 167,
181.
Stra. 286.
See ante 89.
Deed of trust.

JOHN Roper being seised in fee of lands in Cornwall, Gloucester, and Monmouth, did by lease and release convey the premises to William Constable, Richard Snow, and Daniel Hickman, and their heirs, in trust to sell the same, and out of the purchase money, and rents until sale, to pay a debt of 4000*l.* due to Elizabeth and Hesther Walden, by mortgage of the premises, with interest; then in trust for the payment of debts, mentioned in a schedule, to the deed annexed; and the overplus of the money so to be raised, to be paid as the said John Roper by any writing attested, or by his will, should appoint; and for want of such appointment, in trust for the benefit of the said John Roper and his heirs. This deed bore date the 18th of Jan. 1708.

On the 5th of March 1708. the said John Roper made his will, reciting the said lease and release, and the power reserved to him, in the surplus of the said real estate, and bequeathed several pecuniary legacies in the will mentioned to his relations, and the residue of * all his real and personal estate he gave to the respondents William Constable and Thomas Radcliffe, to Robert Hewit and Daniel Hickman, and to their heirs and assigns for ever.

The will.
* P. 231.

1 April 1709. the said Roper added a codicil to his will, and thereby gave the several further legacies therein mentioned, and all the remainder, whether in lands or personal estate, he gave to his executors, the respondents Radcliffe and Constable, and soon after died.

Codicil.

The respondents Thomas Radcliffe and William Constable brought their bill in Chancery against the appellant, and also against the said Hickman, Hewit, Snow and others, to have the trust-estate sold, and for an account of profits, and after the debts and legacies paid, to have the surplus money arising by sale, equally divided between the respondents, according to the codicil.

The respondents their bill in Chancery.

To which bill the appellant put in his answer, insisting he was heir at law to the testator, and entitled to all such real estate as was undisposed of by him; and that the respondents Radcliffe and Constable are, and at the time of the testator's decease were papists, and as such, the appellant was advised, that by virtue of an act in 11 and 12 Will. 3. made for the preventing the growth of popery, the respondents were rendered incapable of purchasing in their own names, or the names of any other persons, to their use, or in trust for them, any manors, lands, profits out of lands, tenements, rents, terms or hereditaments, and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered, or done,

The appellant's answer.

Stat. 11 & 12
W. 3. for the
preventing
the growth of
popery.

Easter Term 13 Ann.

done, to or for the use or behoof of any such person or persons, or upon any trust or confidence, mediately, or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void, &c. And that all interests or profits made out of lands to the use of the respondents were void.

- * P. 232. * And the appellant being heir at law, and a protestant, claimed the benefit of the said estate, and insisted he was intitled to the said *John Roper's* real estate not sufficiently devised or conveyed by him, subject to such incumbrances as he *bona fide* had charged thereon, and by law was capable of doing, and demanded the judgment of the court, whether he should be decreed to join in the sale?

The answer of the protestant executors and devisees.

Robert Hewit and *Daniel Hickman*, insisted by their answer, that the real estate devised by the said will ought to be considered, as to the remaining part of the testator's lands, after a sufficient part sold for the payment of debts and legacies, as land, and not as personal estate; and that so much only ought to be sold as would be sufficient to pay the debts; and in case the respondents were incapable of taking, then the said *Hewit* and *Hickman*, the protestant executors, claimed the estate, as being the only devisees capable to take the same; and insisted, that the codicil, with reference to the devise of the remainder of the testator's lands, did not controul the devise thereof, mentioned in the will; for that, if the respondents were incapable to take the lands as purchasers by the devise, they were to be esteemed as persons not *in esse*; and that the codicil in such case as to the devise of the said lands was void in law.

Judges called to the assistance of the Lord Chancellor.

Case made before the Lord Chancellor.

Lord Chancellor *Harcourt*, at the pressing instance of the appellant's counsel, called in to his assistance Chief Justice *Parker* of B. R. Chief Justice *Trevor* of C. B. *Powell* Judge of B. R. and Sir *John Trevor* Master of the Rolls.

And a case was made by consent, consisting of three queries:

- 1st, Whether a papist can convey his land by deed to trustees, to be sold for the payment of debts and legacies, the surplus of the money to go to papists?
2^{dly}, Whether he may do this by will?
* P. 233. * 3^{dly}, Whether a papist be disabled by this act of parliament from taking land by devise?

Lord Chancellor's decree.

Upon argument before Lord Chancellor and these judges, it was resolved by the consent of all, but *Parker* Chief Justice, that the devise of the surplus-money (after debts and legacies paid) to the respondents *Constable* and *Radcliffe*, was a good devise, notwithstanding the said statute for disabling papists from purchasing lands; the surplus-money being a personal interest in them, and therefore not made void, either by the words, or intention of that act.

As

Easter Term 13 Ann.

As to *Hewit* and *Hickman* (who had brought their cross-bill) they were dismissed without costs; the court being of opinion, that the codicil, whereby the testator gives his remainder, whether in lands or personal estate, to the respondents *Radcliffe* and *Constable*, was a revocation of the devise in his will, of the residue of his personal and real estate, to *Constable*, *Radcliffe*, *Hewit* and *Hickman*; even supposing the persons named in the codicil were disabled by the act.

A subsequent devise to J. S. tho' J. S. be incapable of taking, is a revocation of a precedent devise to A.

From this decree an appeal was brought into the house of Lords; and it was argued for the appellant by Sir *Jeseph Jekyll* and Mr. *Lechmere*, and for the respondents by Sir *Robert Raymond*, Solicitor General, and Serjeant *Pratt*.

N.B. The latter part of the decree, as to the revocation, was not controverted in the house of Lords, but approved of by the counsel of both sides, as good law.

The 3^d Question was spoken to first, *viz.* whether by this act of parliament, a papist was not excluded from taking land by devise?

Argument for the appellant.

And it was insisted for the appellant that he was; for otherwise the intent of the act would be quite overthrown, which was most certainly to prevent papists from making new acquisitions.

A papist incapable of taking land by devise.

* And absurd to imagine that the law-makers should restrain papists from purchasing estates, when they are to pay a valuable consideration; and leave it free for them to take land by devise, where they are to pay nothing for it.

* P. 234.

No one word in the law, of a more determined and fixed signification than purchase; for it will not be controverted, but that the word purchase stands by law opposed to descent; and whoever does not come to land by descent, is in the language of the law, said to take by purchase.

Purchase, what.

Legislators are presumed to speak the language of the law. They certainly who make laws, must know what the legal import of words is; and therefore acts of parliament are to be understood in a legal sense, unless the subject matter of the act does apparently hinder it.

8 Mod. 177. 201, 202.

So in the statute of Mortmain, it has been held, that the clause, whereby a licence is given to purchase lands, did include taking by devise.

The other two questions were resolved into one, *viz.* Whether the interest that was given by the will and codicil, was such an interest, as a papist was restrained by the act from taking?

Lands devised to be sold for payment of debts and legacies, sur-

plus to a papist, this surplus is in nature of a real interest, and as such void by stat. 11 & 12 W. 3.

For to state the case, whether a papist be incapacitated by the act, to take the overplus, is to narrow it too much.

Easter Term 13 Ann.

The disability is to be considered, as it stands at the time of the death of the testator, and not at a future time, *viz.* the sale of the land.

That the act of parliament designed to prevent papists from taking equitable interests, as well as legal ones, is so very plain from the words of the act, that it can admit of no dispute.

* P. 235. And, indeed, unless the act of parliament had done this, it had done nothing at all; since the use of trusts is become so general and universal; and there is as sure a * remedy for a breach of trust in Chancery, as for any legal right in a court of law.

Objection. The end of the act of parliament is plainly to oblige papists, to turn their real estate into personal; and therefore here being a provision for the sale of the land, by positive words in the deed of trust, the end of the law is satisfied.

Answer. If the meaning of the act be to be discovered from the words of it, it meant this and more, *viz.* That Roman catholicks should have no handle, no influence over, or interest in the estate, so much as for an hour.

For all this decree, the estate may be continued on, and the land never sold; and until the land is sold, the profits of the land belong to *Radcliffe*.

If any advances, have in fact been made towards a sale, this may be wholly owing to the disturbance this suit has given them.

Who is there that will disturb them in the enjoyment of the land; and enforce this part of the decree that relates to the sale? since nothing can be got by it, but only obliging a papist to turn a real estate into a personal one.

There is a case now depending in the court of Chancery, wherein the conveyance is settled according to this precedent with this variation only, that the trustees are there empowered to sell, whenever they think convenient. *Vane v. Fletcher*.

Positive directions to trustees to sell, do not oblige them to sell; and they are never blamed by a court of equity for not selling, as long as *cestuy que trust* enjoys the profits, and as long as his interest does not require a sale.

Radcliffe according to the decree, is in effect to have the profits even before sale; for since they are to be applied to the payment of debts, the *residuum* will consequently be the larger.

* P. 236. * Hereditament one of the words of the act; and this imports any thing that is descendable from ancestor to heir.

In the Earl of *Meath*'s case, 1692. that went up to the house of Lords, a daughter being to have such an interest as money arising from the sale of land, it was esteemed such an heirship, as would give her the same privilege, that an heir had.

If such an interpretation be offered to be put upon an act of parliament, made *pro bono publico*, as will make the act void, that is reason enough to reject it.

Easter Term 13 Ann.

If it be objected, that the church was by the statute *de religiosis* disabled from taking lands by any manner of conveyance, and thereupon this evasion was found out, and suffered to take place, viz. the church brought their action for such land as they had a mind to purchase, and judgment was suffered to go by default, and this was held unanimously to be out of the statute; and yet this an act made ^{2 Inst. 459.} *pro bono publico*, and the intent of it as plainly eluded, as here it can possibly be.

The answer is, that this resolution stood upon a particular maxim ^{Maxim of} of law, viz. *Judicium redditur in invitum*, and therefore the law ^{law.} will never presume a fraud; but no judgment in the present case.

Objection. By this means a papist will be incapacitated to pay his debts.

Resp. We are not bound to account for all accidents that may possibly happen.

Suppose the will out of the case, and that it had stood intirely upon the deed of trust; must not the trust have attended the inheritance? would not Mr. *Roper's* widow have had a claim to dower out of it? or would not there, *mutatis mutandis*, have been a tenant by courtesy out of such an estate? if this be so, then undoubtedly it is a real estate; for it is the course of succession, and the law of descent, that is the * true characteristick of, and which constitutes * P. 237. the proper difference between real and personal estates.

This so true, that an annuity is the only personal interest, that can be thought of, which is descendable to the heir.

Nor is there any thing in the will, to turn this into a personal interest. On the contrary, we find the testator himself in his will (which shews what he thought of it) calling it *real* estate. Nor was this an expression, that fell from him by chance; for though it is indeed true, that in the codicil he varies his expression; yet he makes use of one, that does more emphatically import the same thing, viz. *Land*; his words are, *and all the remainder, whether in lands or in personal estate.*

That the death of the testator, is the only proper time to consider, whether this interest was a real or personal one, appears plainly from hence, that this will would not be a disposition of it, unless attested with three witnesses, and duly executed, according to the statute of *frauds and perjuries.*

A devisee stands in the place of the testator, and cannot take any other estate than what it was at the time the will took place, viz. the death of the testator.

Upon the death of the respondents, supposing them capable, the *residuum* would go to their heirs.

If land be conveyed to trustees, to be sold for the payment of debts, remainder to their heirs, is not this remainder the very reversion

Easter Term 13 Ann.

version and estate? the addition of the power to sell makes no alteration in the interest: it does not imply a necessity to sell, but only a power to do it upon occasion.

The selling, or not selling, remains intirely in the power of the trustees, and the *cestuy que trust*.

The heir can compel a conveyance in Chancery upon payment of the debts; nay, he may determine what part of the land the trustees shall sell.

* P. 238. * Upon the whole, this plainly appears to be such an interest as carries along with it all the authority, power and influence of the land, which the act most certainly designed to prevent.

If land be appointed to be sold for the payment of debts, the heir is intitled to the surplus-money, though no directions about it.

If a mortgagee sells, the surplus-money is to be answered to the heir at law, and not to the executor.

This is an estate devised for the behoof and benefit of a *Roman* catholick; because he is to have the surplus, the *quantum* not material. Land in its own nature, land between protestants; but it must be personal estate only to elude the act.

At the instant the testator died the right accrued, and therefore the incapacity must then attach, and likewise the interest then vested in Mr. *Roper*; and the turning it afterwards into money will not devest an interest already vested in the heir at law.

To interpret a law so that the letter shall remain, but the end be defeated, is in effect to assume a legislative power.

Every *Roman* catholick will be instructed in an easy way how to elude and frustrate this act of parliament.

It is but contracting a debt, or giving a legacy: it may be done by deed as well as will; for if this surplus be to be considered as personal interest, they are not disabled from conveying a personal interest.

They may convey without consideration, if they conceal it: nay it cannot be discovered, for a bill would not lie in equity for this purpose, because the discovery would induce a forfeiture.

Argument *pro respond.*

For the respondents.
N^o 12.

* P. 239.

The word purchase, in the vulgar and common acceptation of it, does not import devise. The word purchase, is in *Littleton's Tenures*, defined to be the possession * of land that a man comes to by his own act, a definition not applicable to devise.

Papists may come to land by descent notwithstanding this act, and therefore why not by devise; unless the legislators thought fit to prevent it.

Two rules to be observed in the interpretation of statutes; 1st, Such an interpretation must be made as will support the intention of the act. 2^{dly}, Such an interpretation must be made as will make the whole consistent with itself.

The

Easter Term 13 Ann.

The general intention of this act was 1st, by gentle and easy methods to bring papists to conformity.

2^{dly}, To prevent the increase of their landed interest.

And therefore the first clause expressly provides, that the incapacity of the ancestor shall not descend upon his posterity.

And whensoever the person disabled conforms, the disability is gone.

If an heir be under the age of eighteen at the time of the descent, he is disabled by the act from taking the estate, unless within such a time he conform, &c.

Whereas a person over that age may take by descent, or devise, without any restriction at all; the reason of which difference was possibly this, the legislators looked upon persons under the age of eighteen to be so young, that they were capable of any impression, and might be easily made protestants; whereas from that age and onwards they would be so riveted and confirmed in their prejudices, that their conversion must be esteemed as next to an impossibility.

Now if the word *purchase* in the latter clause be extended to take in devise, the latter clause will in many respects be repugnant and contradictory to the former.

For whereas by the former clause, a person under the age of eighteen, on the 29th of September 1700. may take by devise, if within six months after he attains that age, he takes the oaths, &c. The latter clause * thus interpreted makes such a person absolutely * P. 240. incapable.

By the former clause, though such person should not within six months, &c. yet whenever he does conform, the incapacity is removed, and the devise shall take place; whereas by the latter thus expounded, he shall not.

The word *purchase* therefore cannot be interpreted to include devise, without making the act contradict itself.

The word *such* is tied down to *purchase*, and penal laws never extended.

A thing that is to be done, must be looked upon as done. It is in the power of the trustees, immediately upon the death of the deviser, to sell the land.

As to the objection, that it appeared from the decree that the profits of the land until sale did in effect go to *Radcliffe*, since the application of them to the discharge of the debts must increase the surplus: It may be answered, that the surplus would be more increased by having the land sold immediately, the interest of the money arising from the sale much exceeding the profits of the land.

Though a court of equity will at the desire of the heir, or residuary legatee, decree them the land, yet it will not do this in spite of their teeth.

Easter Term 13 Ann.

Such a surplus is liable to pay debts upon simple contract, which land is not.

If this surplus be personal estate in itself, the word *real* in the will cannot alter or change the nature of the estate.

No difference, whether the money arises from the sale of land, or any other way, as long as it is money.

The surplus of the money arising from the sale of the land, is what is devised, and what the respondents have by their bill demanded as soon as they could.

* P. 241.

Where an estate is devised to be sold for the payment of debts and legacies, Chancery will give the heir or residuary legatee their election to pay the money and take the estate.

The election, that a court of equity gives the heir, or residuary legatee, to have either the money or land, is a consequence of his being intitled to the surplus money; and therefore to what purpose can it serve for the land to be sold, if he will take upon him the discharge of debts and legacies, and desire to have the land?

Now therefore, since a court of equity gives this election in favour of the heir, or residuary legatee, strange to suppose, that in the present case a court of equity should take this election away; and refuse to decree him the money, when by his bill he desires it; only because, by act of parliament, he is incapacitated to take the land.

As to the objection, that at the time of the conveyance it is real estate.

It may be answered, that the reason why the land if not sold before the death of the ancestor shall descend to the heir at law, or pass to the residuary legatee, is, because it is at his election to choose either land or money; but here the heir, or residuary legatee, had no such election, which alters the case.

The Chancery could not have decreed a papist the land though he had desired it; should it have done so, the decree would have been void.

As to the objection, that the land may not be sold: the answer is, that the trustees by not selling will be guilty of a breach of trust; and as a breach of trust is never to be presumed, that cannot authorize a different interpretation.

By *profits out of lands*, must be understood continuing profits, and not money arising from sale.

It was replied for the appellant,

The reply.

* P. 242.

That the respondents preferring their bill in equity very speedily, and claiming this as personal estate, not * at all to the purpose; for not obliged to have done it at all.

As to the definition of the word *purchase*, it will extend to devise, for to that the agreement of the devisee is necessary, which is an act. *Co. Lit.* 10. a. speaking of the several conveyances of purchase, uses the word in our sense.

Easter Term 13 Ann.

As to what was said, that to include devise under the word *purchase* in the latter clause, would make one part of the act of parliament contradict the other: it may be answered no, for a general subsequent clause may be restrained by a precedent one.

The rule that penal laws are not to be interpreted by equity, holds in cases of laws that are penal upon particular persons, but not where laws are made for the public good, and the peace and safety of the realm, which is the case here. Ante 117.

As for the objection framed from the *stat. de religiosis*; the true answer is, that the power of the church was so very great in those days, as might probably have an influence upon the proceedings of *Westminster-hall*; but it is to be hoped now, that there will be no partiality in favour of papists, and in prejudice of a protestant heir. Property will be very precarious, if a court of Chancery can at pleasure call a real estate a personal one, or a personal a real one.

The Judges being summoned to attend and give their opinions, were divided, six against five; six for reversing, and five for affirming the decree. Had Lord *Theobald* been there, and stuck to his former opinion, there had been six against six.

The decree was reversed by a great majority of Peers.

*Trinity

* P. 243.

Trinity Term

13 Annæ. B. R.

See ante 160.

Miles and Williams.

Bankruptcy.
Debt upon
bond brought
against hus-
band and wife:
they plead a
discharge by
the bankrupt-
cy of the hus-
band, and
conclude Et
hoc parati sunt
verificare.

DEBT upon bond brought against defendant and his wife; they plead in bar, that the bond was entered into by the wife *dum sola*; that a commission of bankruptcy issued out against the husband, who in all points conformed himself to the statute about bankruptcy in the 4th year of the Queen; and so both defendants say, *quod vigore* of the statute of the 4th of the Queen, and other statutes, he became a bankrupt, *per quod* the debt was discharged. *Et hoc parati sunt verificare.* To this plea plaintiff demurs specially.

Special demurrer. Court of opinion, that the bond was discharged by bankruptcy of the husband; but being also of opinion that they ought to have concluded their plea to the country, and this being one of the causes assigned for demurrer, plaintiff had his judgment.

1st, Because a bond entered into by the wife *dum sola fuit*, is not discharged by the bankruptcy of the husband.

2^{dly}, Because they ought to have concluded their plea to the country.

* P. 244.
1st Point.

* Chief Justice *Parker* delivered the resolution of the court, as to the 1st point to be, that such a debt was a debt within the statute of the 4th of the Queen; and consequently that it was discharged by the bankruptcy of the husband.

Stat. 4 Ann.
cap. 17. sect.
7.

The words of the statute are, *Shall be discharged from all debts by him, her or them due and owing at the time that he, she or they did become bankrupt.*

The question therefore will be, whether this be a debt due and owing at the time of the bankruptcy?

It has been argued by the bar, and very reasonably, That if debts due to the bankrupt his wife are assignable by the commissioners, then it is reasonable that debts owing by the bankrupt's wife should be discharged by the bankruptcy.

Now

Trinity Term 13 Ann.

Now in order to know whether a debt due to the wife of the bankrupt be assignable, the intention of the *stat. of 13 Eliz. cap. 7.* and *1 Jac. cap. 15.* must be considered.

By the *stat. primo Jacobi*, which is explanatory of that of *Eliz.* it is provided, that the commissioners shall have power to grant and assign, or otherwise to order or dispose all debts due or to be due, to and for the benefit of the bankrupt, by what person or persons soever, or in what manner and form soever, to the use of the creditors, &c. and that the said assignment or disposition, &c. shall so vest the property, &c. in the assignees as fully, &c. as if the said bill, bond, &c. whereupon the said debts shall arise and grow, had been made to or with, or for the assignees.

Now the intention of this act of parliament is plainly this, that the bankrupt being not thought a proper person to be intrusted with the management of his own estate, for fear he should defraud his creditors, therefore the act puts the commissioners in the place and stead of the bankrupt, and consequently whatever estate the husband can turn into money, in order to pay * his debts, the same is assignable by the commissioners.

The best way of interpreting statutes, is by the rules of common law, in like cases.

Thus the statute *de donis*, which says, that a fine levied of entailed lands shall be *ipso jure nullus*, has been interpreted not to make a nullity, but a discontinuance; because at the common law, if a bishop seised in right of his church, or a husband of his wife, had aliened by fine, &c. it was but a discontinuance, 3 Co. 85, &c.

21 H. 7. fol. 19. Bond entered into to two, one grants the bond to the King, the King may sue alone.

Constant practice in outlawry to seise all the debts due to the wife, and yet the words of the writ *bona & catalla, terras & tenementa* of the person outlawed, are rather weaker then the words of the statute.

Hobart 253. *Breadman* and *Coales* a strong case; for it proves 1st, That the husband may assign a debt due to his wife, by the common law; and 2dly, that he was not restrained by *stat. 7 Jac.* because, says the book, it was the husband's own debt, which brings it within the very words of the fourth of the Queen.

It is certainly a very equitable interpretation, that whatever may be applied by the bankrupt to the payment of debts, may be assignable by the commissioners.

The contrary opinion, that it is not assignable, promotes no good end in the world.

To the objection, that the statute does not extend to debts due to the bankrupt as administrator or executor, it may be answered, that it is nothing to the purpose, for he has no interest in those debts to his own use, and when he recovers them they are assets, &c.

Debts due to a bankrupt's wife assignable by the commissioners. Stat. 13 Eliz. cap. 7. 1 Jac. c. 15.

* P. 245.

Statutes best interpreted by the rules of common-law in like cases.

1st Objection.

Trinity Term 13 Ann.

* P. 246. ^{2d} Objection. But it is objected, that this statute extends not to debts due to him and another; and for this purpose *Levinz.* 17. is quoted.

To this I answer, *1st*, That there is no judgment in that case. *2dly*, That I doubt whether it be certain, that the whole debt is not vested in the crown, upon the outlawry of one, where there are two obligees.

That a debt due from the bankrupt and another is within the act, appears from the *stat. 10 Ann. cap. 5.* a declaratory law: but this is his debt as he is *one* with his wife.

^{3d} Objection. Another objection has been taken, that this debt shall survive to the wife if the husband die before he recovers it, and this construction will deprive her of this contingency.

The answer is, that the husband might by his release have discharged this debt: now this is a discharge of the legislature, applied in case of his debts.

The assignee has the same remedy to recover it, that the bankrupt himself had.

If a note be payable to a feme sole, or order, and she afterwards marries, her husband is the proper person to indorse this note.

Now, that this debt due from the wife is discharged by the bankruptcy, seems to me to be clearer than that a debt to the wife should be assignable, &c.

For this construction makes for the benefit and interest of the bankrupt, creditors and wife. As to the bankrupt, nothing can be harder than that he should be stripped of every thing, forced upon oath, and at the peril of felony, to make a full discovery, and yet after all, not to be discharged. Intention of the *capias*, only, that the love of liberty should oblige to a full discovery.

* P. 247. The discharge of the bankrupt stands upon this reason, that he is stripped of every thing that should enable him to pay.

This reason holds equally to all the debts for which he may be sued.

This exposition better likewise for the creditors; for if this debt be discharged, then is a creditor of the wife a creditor within the statute, and to come in for an equal proportion, which is far more eligible than an action, good for nothing unless the wife survive, and perhaps not then neither.

As to the wife, that this exposition is beneficial to her, is so plain, that it has been urged as an objection that it will be too beneficial.

Whether this be a temporary discharge during the coverture, or a perpetual one, is not now a question; but I am inclined to think it a perpetual one: nor is this unreasonable, for the law looks upon the debt as paid, since the creditor is let into the common fund.

As to the objection, that this may be a fortune to a woman; *Resp.* Very reasonable, that she should share in the advantages as well as disadvantages of the bankruptcy.

Whether debts due from the wife be discharged by the bankruptcy of the husband for ever, or only during coverture?

Trinity Term 13 Ann.

If a supposition be made, that a woman may, precedent to her marriage, put her estate into the hands of trustees, for her separate maintenance; and so her debts will be discharged by the bankruptcy, and her estate out of the reach of the creditors: The answer is, No; for I am of opinion that such a settlement or conveyance, *quoad* the creditors, shall be deemed void and fraudulent.

debts shall not be discharged by the bankruptcy of her husband, but such settlement or conveyance, *quoad* the creditors, shall be deemed void and fraudulent.

Where a woman puts her estate, precedent to her marriage, into trustees hands for her separate maintenance, her

As to the objection, that this discharge is a personal privilege, and therefore not communicable to the wife; the answer is, that her discharge is necessarily consequential upon his.

As to the 2d point, the court was unanimously of opinion, that the plea of the defendants in bar was naught * for not concluding to the country; and therefore upon this 2d point, (being specially assigned for cause of demurrer) judgment was given *pro quer*.

2d Point.
* P. 248.
Case of Perry and Carleton, Trin. 1715.

Queen and Simpson.

THIS was a conviction of deer-stealing, before justices of the peace, upon the statute of 3 & 4 W. & M. cap. 10.

See post. 341.
Stra. 44.
Conviction of deer-stealing, upon stat. 3 & 4 W. & M. cap. 10.

Exceptions taken were,

1st, That no certain time was laid for the commission of the offence, but only that between such a time and such a time the defendant did steal *unum cervum*.

1st Exception to the conviction.

2^{dly}, That the conviction was behind his back, and without hearing him. Indeed he was summoned, but the act gives no manner of authority to proceed by way of summons.

2^d Exception.

3^{dly}, The summons is insufficient, supposing the justices could proceed in that way; for he is summoned to appear at *Bolton*, which must be understood to be a vill; and then how should the defendant know the house where the justices will be?

3^d Exception.

Then it is to appear such a day, but not what time of the day. Perhaps the justices came at five o'clock in the morning, and the defendant, not being there then, was convicted, though he came afterwards.

4^{thly}, Though in the information the offence may be said to be committed between such a time and such a time, yet the proof ought to be certain. Now the oath is no more, than that the defendant did, within such a time and such a time, steal *unum cervum*; so that the time is left as uncertain in the evidence, as in the information. And then *non constat*, that the evidence relates to the same deer; it should have been *cervum in informatione prædictæ mentionat*.

4th Exception.

* As

Trinity Term 13 Ann.

* P. 249. As to the 1st exception, in behalf of the conviction it was
 Answer to the 1st Exception. said, that it had been taken in the case of *King and Chandler*, and
 Galk. 378. there over-ruled; and that it was the constant course of informa-
 tions, in the court of Exchequer, to set forth the time in the man-
 ner it is here done.

Answer to the 2^d Exception. As to the 2^d exception, that the act gave no authority to proceed
 by summons, it was answered, that no way of proceeding whatso-
 ever was directed by the act; that therefore the act being silent in
 this point, it must be left to the discretion of the justices; and that
 the way of proceeding by summons, was a way very consonant to
 reason and justice, in as much as it gives the defendant time and
 opportunity to make his defence. That the want of summons has
 been objected even in cases upon acts of parliament, that did not
 direct the proceedings to be by way of summons; as in the case of
 Mich. 3 Ann. *The Queen and Peach*. This was enforced by precedents, where,
 upon this very act of parliament, the proceedings had been by sum-
 mons.

Answer to the 3^d Exception. As to the 3^d objection taken against the summons itself, viz. the
 uncertainty of the time and place, when and where the defendant
 was summoned to appear:

It was answered, 1st, That this objection supposes very great ab-
 surdities; as first, that the defendant cannot find the justice out;
 secondly, that the justice should come at an unreasonable hour, &c.

2^{dly}, That the return, which must be taken for true, is an an-
 swer to the objection. For the return is, that the defendant *licet*
debite summonitus ad hoc tempus & hunc locum, did not appear; so
 that at whatever time or place he was convicted, it must be now
 taken for true, that he was summoned to appear at that time and
 place.

Answer to the 4th Excep- As to the 4th objection, viz. want of certainty in the proof, it
 tion. was answered, that it was next to impossible for the witness to be
 able to swear to the very * day, and not to be intended that there
 * P. 250. were more deer stolen than one.

Court. Chief Justice *Parker*: More agreeable to the course of the com-
 Agreeable to mon law that he should be summoned. Nothing in the objection
 the course of as to the evidence. Time must be taken to look into the prece-
 the common dents.
 law that the party should be summoned.

Judge *Eyre*: As to the objection, that the time should have
 been set forth with more certainty than that *between such a time and*
 That between such a time *such a time, &c. that has been sufficiently settled in Chandler's case*
 and such a to be well enough.
 time he stole a deer, is well.

Salk. 378. It is true, that the *ad hoc tempus & hunc locum* cannot be confined
 to a particular hour or place; but then it is not to be supposed but
 that a magistrate will administer justice with integrity; and it is the
 duty of the party summoned to attend his time and place.

Trinity Term 13 Ann.

In informations and indictments, no judgment can be given, unless the defendant appears. The defendant may indeed have judgment of outlawry pass'd against him; but that is for his contempt in not appearing. And if the judges of superior courts, cannot proceed to judgment, unless the defendant appears; *a fortiori* justices of the peace cannot.

Some acts of parliament indeed give justices of the peace a power of proceeding upon default: but *exceptio probat regulam in rebus non exceptis*; it seems to me therefore, that he should have been apprehended by warrant.

Powers junior. The design of the act of parliament is to give a summary way of proceeding. The defendant has been summon'd which surely is sufficient; for absurd that he shall take advantage of his own contempt.

Tho' the Party do not appear; yet if he has been summon'd, it is sufficient.

* Cole and Hawkins. B. R.

* P. 251.
See post. 348.

IN *assumpsit*, plaintiff declares upon a promise the 16th of Jan. 1706. Defendant pleads in bar the statute of limitations.

Assumpsit.
Pleading.

Plaintiff replies, that the bill was exhibited the 23d of Jan. 1713, and that *causa actionis accrevit infra sex annos*. To this the defendant demurs.

It was insisted by Mr. *Brantbwayt* for the defendant, that this replication was a departure from his declaration. For tho' in transitory actions, time and place are not material; and the jury may, notwithstanding the promise was at a different time or place, find for the plaintiff; yet the plaintiff shall not be at liberty himself to vary from, or falsify his own record. 5 H. 7. 28. 3 Lev. 348. 2 Cro. 364. Book of assise 22, pl. 86. Cro. Car. 228, Tyler and Wall. Raym. 86.

For the Defendant.

It was argued by Mr. *Salkeld* for the plaintiff, that a departure was always a going off from something material, that had been alleged before; and not from things immaterial.

For the Plaintiff.
Varying from that which is not materially alleged, is no Departure, Salk. 222.

Now in transitory actions, time and place not material; upon issue they are certainly immaterial.

In transitory Actions Time and Place not material.

By the common law, time was so far material, that the time in the declaration, must not be subsequent to the bringing of the action.

In *Plowd. Com.* 90. *Pollard's case*, agreed, that if trespass be brought against two defendants, and one of them dies *ante impetrationem brevis*, the action abates, otherwise, if pleaded that one of them died afterwards.

Trinity Term 13 Ann.

1 Lev. 110. *Raymond* 86. *Lee* and *Raynes*: but the case he said was mis-
 * P. 252. reported; for he had in his hand a manuscript * report of that
 case, of lord chief justice *Keyling*, wherein it appear'd, that the
 opinion of the court in that case, was that the statute of limitations
 does not take away the liberty of laying the action at any time;
 and therefore, if the defendant make the time material by pleading
 the statute, the plaintiff may follow him by varying from the time
 set forth in the declaration; provided it be not a time subsequent
 to the declaration. And this case is cited to this very purpose in
 1 *Keble* 799.

Salk 222.
 In debt upon
 bond, plaintiff
 shall not vary
 the day in his
 repl. from
 that alledged
 in narr. but
 otherwise in
 trespass.
 Court.
 Where time
 material in
 pleading.

Mich. 7 Gulielmi B. R. Webley and Palmer, difference taken
 between bond and trespass. In action of debt upon bond, the plain-
 tiff shall not in his replication, vary from the date of his bond in
 his declaration; but in trespass, the plaintiff may vary from the
 day, if the defendant necessitates him.

Chief Justice *Parker*: Time material, if subsequent to the decla-
 ration; time material, if the defendant answers to the time; time
 material upon the statute of limitations.

As the matter stands upon the pleading, the plaintiff in his replica-
 tion shews, that his bill was exhibited seven years after the cause of
 action.

By statute for
 amendment
 of the law, no
 advantage can
 be taken up-
 on a general
 demurrer, of such faults in form, as would be cured by verdict.

Now this being a general demurrer, it stands by vertue of the
 statute for the amendment of the law, as if there had been a ver-
 dict; so that it must be considered, whether this be a matter of
 form or substance.

Powys senior: Time here material upon the statute of limita-
 tions: Not probable to lay it in the declaration so many years ago,
 unless the fact was so; most commonly, people lay their cause of
 action, at a later time than it really was.

In transitory
 actions time
 and place laid
 only for
 form's sake.

Powys junior: In transitory actions time and place must be laid
 for form's sake, as to the defendant and * jury; for the jury not bound
 by it, and the defendant cannot traverse it without a special justi-
 fication. Plaintiff indeed in his replication has verified the Plea of
 the defendant. He has now fix'd both the boundaries; in his decla-
 ration he has shewn the time of the cause of his action, in his repli-
 cation the time when his Bill was exhibited. And yet if instead of
 a demurrer, issue had been joined, the jury might have found for the
 plaintiff, if in fact his cause of action was within six years. To be
 considered therefore, upon the statute for the amendment of the law,
 whether this not being a special demurrer, the fault in the pleading
 is not now cured.

Chief Justice *Parker*: This may be considered likewise, That
 notwithstanding that statute, it does not follow, that judgment must
 upon this general demurrer be given for the plaintiff, because upon

Trinity Term 13 Ann.

a verdict for the plaintiff, it would have been so; and that for this reason, Because upon a verdict for the plaintiff, a new fact is laid before the court, viz. That the cause of action did arise within six ears.

Adjournatur. Vide post. Hil. 3 Geo. 1.

Walter and Laughton. B. R.

THIS was an action *qui tam*; and the objection was, That the conclusion was *et inde producit sectam* generally; and not *tam pro Domina Regina, quam pro seipso*.

But resolved that this must be so understood; and precedents being both ways,

Judgment *Respondeas Ouster*.

Anciently *Inde producit sectam*, was producing witnesses. 17 Ed. 3. *Inde producit sectam*, anciently what it signified. 48. *Fleta lib. 2. cap. 62. sect. 2. cap. 63. sect. 9, 10, 11.* 5 Ed. 3. 171. 10 Ed. 2. 291.

* **Johnson and Gardiner. B. R.**

* P. 254.

THIS was a writ of error out of the court of C. B. and for plaintiff in error, it was insisted upon, That the declaration was naught; because action brought against the defendant, as executor, upon a promise made by the executor *post mortem Testatoris*, That whereas the Testator was indebted to the plaintiff in March for Goods sold and delivered, he promised to pay upon the 23^d of November.

Now it was said, That this promise of the executor, founded plainly upon the Consideration of forbearance, made it the contract of the executor; and therefore the action should have been brought against him in his own name.

But supposing the action well brought against him as executor, then the Judgment was wrong, being *de bonis propriis*, instead of *de bonis testatoris*.

To this it was answered, That tho' the defendant is named executor, yet it appears by the declaration, That the executor is chargeable upon his own contract, and the bare naming him executor *non nocet*.

Always supposed, where there are promises of payment upon such considerations, That the Executor has assets, and therefore not necessary to aver his having Assets; for unless he had, there was no occasion for such a promise. *Cro. Jac. 602, 613.*

Upon an *assumpsit* by executor, judgment is always *de bonis propriis*; for all one as if the executor had given a bond for the money. 9 Co. 93. *Cro. Eliz. 91. 406.*

Action
Qui tam.

Question,
Whether an
Executor, up-
on a promise
to pay a debt
of the testa-
tor's at a fu-
ture time,
ought to be
sued by that
name, or his
own?

For the plain-
tiff in error.

For the de-
fendant in
error.

It

Trinity Term 13 Ann.

Reply. It was replied for the plaintiff in error, That the consideration was not the forbearance, but the old debt, the debt of the testator's; and that the promising to pay it barely, upon a future day, will not make a new Consideration.

* P. 255. * *Hob.* 188. Judgment *de bonis Testatoris*, tho' non repair, was in time of the executor.

Court. *Parker* Chief Justice: The naming him executor surplufage; because it appears upon the face of the record, that the demand was a Demand against him upon his own Contract.

Hob. 18. In effect the forbearance is the consideration of this promise; because without forbearance no advantage can be taken of this promise. *Yard and Ellard*, 10 *Will.* 3.

Salk. 117. And to this opinion the rest of the court inclined.
Sed adjournatur.

Parker and Crook. B. R.

Covenant upon a Deed dated at Fort St. George, in Indibus Orientalibus.

THIS was an action of covenant, upon a deed indented. It was objected to the declaration, That the defendant is said in the declaration, to continue at *Fort St. George in Indibus Orientalibus*. And upon oyer of the deed, it bears date at *Fort St. George*; and therefore the court, as was pretended, had no jurisdiction. *Latch* 4. *Lutwyche* 950.

An action will lie in England upon a deed, dated in foreign parts; but a place in England must be alledged in the declaration pro forma. *Salk.* 659, 660.

Parker Chief Justice: An action will lie in *England* upon a deed dated in foreign parts; or else the Party can have no remedy; but then in the declaration a place in *England* must be alledged pro forma. Generally speaking the deed, upon the oyer of it, must be consistent with the declaration; but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, not to be regarded; as here the contract being of a voyage to be performed from *Fort St. George* to *Great Britain*, does import that *Fort St. George* is different from *Great Britain*.

Afterwards in *Hillary* term, plaintiff had his judgment, notwithstanding this objection.

* P. 256. * The Words in *Indibus Orientalibus* do not necessarily import the Place to be out of *England*; there is a place call'd *Holland* in *Lincolnshire*; and there may be a *Fort St. George* in the Parish of *St. Martin's*. In *W. Jones* 69. same objection taken and over-ruled.

Michaelmas

Michaelmas Term

I Geo. I. B. R.

Vincent *versus* Atwood.

SCIRE facias brought against bail; defendant pleads that the principal died before the return of the *capias*, plaintiff replies, That the principal did not die before the return of the *capias*; the defendant demurs.

the *capias*; replication, That he did not die before the return of the *capias*; defendant demurs, judgment nisi, *pro quer.*

Agar pro def. The replication naught.

1st, Because the plaintiff has not set forth, That there was any *capias* at all sued out; but only that the principal did not die before the return of the *capias*.

* 2^{dly}, Because by this replication, there is an issue formed, wherein the jury must at once try matter of law, matter of record, and matter of fact.

Brantbwayt pro quer.

When the defendant pleads, That the principal died before the return of the *capias*, he certainly admits, That there was a *capias* sued out; and the only thing doubted is the death of the principal, &c. Necessary for the plaintiff only to answer the defendant's plea, and not set forth that which is admitted by the defendant.

In a *scire facias* not necessary to set forth the awarding of a *capias*. *Lutwyche* 1281. 2 *Cro.* 97.

Condition of a bond that *H.* marry the daughter of *D.* before *Easter*. Debt brought upon this bond; held, That if the defendant pleads that the daughter died before *Easter*, it is enough for the plaintiff to say in his replication, that she did not die before *Easter*, without setting forth that he did not marry her. The reason is, be-

Y y

cause

Michaelmas Term 1 Geo. 1.

cause the not marrying is a fact admitted; and the other, the only point in question. *Yelverton* 24.

Had the plaintiff replied, there was a *capias* sued out, and the defendant rejoined *nul tiel* record, the rejoinder would have been a departure from his bar. How then can it in reason be necessary, for the plaintiff in his replication to set forth that, which the defendant cannot deny in his rejoinder, without a departure?

6 Mod. 139.
Salk. 321.
322.
Salk. 221.
222.
3 Salk. 123.

Perkins and Woolaston, 3 *Anna*, action of debt against bail. Defendant pleads no *capias*; plaintiff replies, there was a *capias*; defendant rejoins, That the force of the *capias* was suspended by a writ of error. Resolved, That this rejoinder was a departure from the bar.

Judgment *nisi, pro quer.*

* P. 258.

* Queen *versus* Aires.

See Post. 354.
Scire facias to
repeal letters
patents for the
grant of a fair.

A *Scire facias* was brought by the late queen, to repeal her own letters patents, whereby she had granted some fairs to *Th. Aires*, in the town of *Winster* in the county of *Derby*.

The *scire facias* sets forth, That precedent to the grant of the fairs, a writ of *ad quod damnum* did issue out; but that it was clandestinely executed, and so that the jury found that the grant was not *ad damnum* of any body; when it was *ad grave damnum* of the earl of *Rutland*, who had fairs in the manor of *Bakewell*, four miles distant.

The defendant *protestando*, that it was not clandestinely and fraudulently executed, pleads, That the grant of the fairs to him was not *ad damnum* of the earl of *Rutland*, or any body whatsoever. Upon this issue joined in Chancery.

A *venire* awarded out of that court, returnable into *B. R.* the court of *B. R.* awards a *distringas*; upon which the cause is tried, and the jury find, That it was *ad grave damnum* of the earl of *Rutland*.

Motion in arrest of judgment.
1st exception.

Mr. *Salkeld* moved in arrest of judgment.

His first exception was, That the *scire facias* was abated by the death of the Queen.

By the common law, no difference between the King and the subject; but the death of the plaintiff had in both cases abated the suit.

Whether scire facias be not sometimes an original, and not always a judicial writ?

Indeed were this an original writ, it would be helped by the *stat. 1 Anna, cap. 8.* but being a judicial writ it is not. 3 *Lev. 220.* Sir *Oliver Butler's* case; held, That a *scire facias* is a judicial writ.

* P. 259.

Answer.
Sir Edward Northey.
Of judicial Writs, what.

To this exception it was answered by the Attorney General, That this was not a judicial, but an original writ. That judicial writs are those only, that are founded upon judgment, and judicial process;

Michaelmas Term 1 Geo. I.

but that this was no consequence of any judicial proceeding, or founded upon the former letters patent, but purely the fraud; and that there are many *scire facias*'s in the *Register*, among the original writs.

His 2d exception was, that upon issue join'd, the court of chancery, (not being a proper court for trial of a matter of fact) is at a full stand, and the court of B. R. ought to have awarded the *venire*; whereas here the *venire* is awarded by the court of Chancery, returnable into B. R. *Palmer's Rep.* 410. 2d Exception.

To this exception it was answered, that the constant practice is, for the chancery to award the *venire facias*, returnable into B. R. So is the case of *Jeffreson versus Morton and Dawson*, 2 *Saunders* 6, 23. and *Sir George Reynel's* case. And the case in *Palmer*, as reported in *W. Jones* 82, does not make against it. Answer.

Court. No other way to give day in this court, but by awarding a *venire* out of Chancery returnable here; and always done so. When Issue is joined in Chancery, that Court awards the *Venire*.

His 3d exception was, that the fairs granted to Mr. *Aires* were four, one upon *June* 23, another *October* 17, a third *November* 28, another *April* 12; those granted to the Earl of *Rutland* were upon *March* 29, *May* 17, *August* 25. 3d Exception.

It appears plainly that the days are very different; and for ought appears upon the record, the places, where these fairs are to be held, may be 40 miles distant; for the record says only, that they are four miles distant, but does not add, and no more.

* Now it was said, that it was not to be presumed, that where time and place are so different, the one sett of fairs could be prejudicial to the other. * P. 260.

To this exception it was replied by the Attorney General, that time and place were matters of evidence for the jury, not the court to consider of: that damage or no damage very often depended upon different circumstances, and that it was possible for a market to be held on the same day, and close by another without prejudice, as in *London*. Answer.

4th Exception was, that a *scire facias* was not the proper remedy; but that it should have been by action of case, to have recovered damages. 4th Exception.

In answer to this exception, these cases were cited by the Attorney General. *Dyer* 197, 198. 11 *Co. Rep.* 74. 8 *Rep.* *Prince's* case. *Fitzberbert Tit. Brief* 651. 2 *Vent.* 344. *Sir Oliver Butler's* case, 3 *Lev.* 220. where held, that the crown *de jure* ought to suffer the subject to use their name. Answer.

5th *ject.*

Michaelmas Term I Geo. I.

5th Exception.

5th exception was, that the Earl of *Rutland* had not set forth a sufficient title to the fair, by alledging it to be appendant to a manor.

6th Exception.

6th Exception was, that being an issue out of Chancery, and sent to the common law only for trial, the record ought to be remitted into Chancery, and judgment given there, and not here. *Raym.* 178.

Court.

But this point, the court said, had been so firmly settled, that they would not suffer it to be debated. *Case Jefferson &c. 2 Saunders* 26, 27.

Adjournatur. To be set down in the paper.

Vide post. Hil. 3 Geo. 1.

* P. 261.

* Parishes of *Pawlet and Burnham.* B. R.

Poor.

Actual service,
as well as hiring for a year
necessary to
make a settlement.

A Covenant servant for a year, at the rate of 3 *l.* per ann. wages, leaves his master by consent, three weeks short of a year; his master deducting six shillings for the three weeks out of his wages.

By order of two justices, it was adjudged a good settlement.

Upon an appeal to the sessions, the court being divided, the order of the justices was confirmed. Stated specially; and being removed by *certiorari*, it was urged in support of the order.

1st, That it being set forth in the order, that he was a covenant servant, it must be intended a covenant in writing; for the law knows nothing of a parol covenant; if so, the covenant could not be discharged by parol; and consequently in point of law, he continued a servant to the end of the year.

2dly, It was said, that his departure but three weeks before the end of the year, shews it to have been a fraud, contrived to prevent a Settlement.

Court quash'd the order; and held actual service for a year necessary.

Clerk and Lee. B. R.

Motion for prohibition.

MARY Clerk being prosecuted in the spiritual court, by a proctor, for his fees, in a suit brought by this Clerk, against her then husband *Young*, to be divorced, prays a prohibition; suggesting, 1st, that she was a feme-covert; and as such not liable to be sued singly to pay the fees. And 2dly, that all actions upon the case are suable at common law, & *non alibi*.

Now

Michaelmas Term 1 Geo. I.

* Now Mr. *Salkeld* came to shew cause why a prohibition should * P. 262.
not go.

As to the suggestion of her being a feme-covert; he insisted, 1st, Against the prohibition, 1st point. that it was now too late for her to take advantage of it, because it had not been pleaded in the spiritual court.

2^{dly}, That after a sentence of divorce, the wife stands in the capacity of a single woman, and has a property distinct from her husband.

To this point it was answered by Mr. *Darnell*, that it was very Answer. true, that after a sentence of divorce, husband and wife are to be considered as single persons; but that here there was no sentence of divorce, but the marriage declared to be null and void.

2^{dly}, That her marriage to *Clerk*, was precedent to the proctor's suit for his fees, in that suit, where the marriage between her and *Young* was declared null.

But this point was thrown out of the case; it appearing, that the libel was brought against her not as a feme-sole, but against her and her husband *Clerk*.

And then the single question was, whether a proctor may not sue ad point. Whether a proctor may sue in the spiritual court for his fees? in the spiritual court for his fees.

Mr. *Salkeld* argued, that he might, 1st, from authorities; 2^{dly}, from the reason of the thing.

1st, From authorities. 1 *Mod.* 167. 3 *Keble* 203, and this reason given, that fees are due by provincial constitutions. 1 *Ventris* 160, 165, if the custom be denied, then a prohibition must go; not otherwise. 2 *Keble* 810, 845, custom denied, prohibition must go, *non aliter*. And said, that the jurisdiction extended as much to fees, as costs, 3 *Keble* 516.

2^{dly}, Reason of the thing.

Fees nothing but wages, for work done in a spiritual court by a spiritual officer, in a suit of spiritual consufance.

* A proctor as much an officer of the spiritual court, as an attorney * P. 263.
of a court at common law.

The spiritual court an ancient court, and has ancient officers belonging to it, for these ends; 1st, to carry on the business; and 2^{dly}, to preserve the honour of the court: but impossible that these ends can be attained, while the court is bereaved of the attendance of its officers.

Mich. 8 Will. Proctor compellable by law, to serve in his employment.

Michaelmas Term 1 Geo. 1.

Salk. 87.

Co. Lit. 195, held, That an attorney is so too : consequently the attendance of neither of them ought to be hindered, by obliging them to sue for their fees in foreign courts.

Justices of
peace, their
jurisdiction
as to servants
wages.

By the Stat. of *Eliz.* justices of the peace have power to compel men to serve in husbandry ; in which statute there is no express clause, whereby the justices are enabled to redress such servants, in case their wages are denied ; yet held by the equity of the statute, that since the justices have a power to compel their Service, they should likewise have a power to give them redress as to their wages.

All courts have proper fees belonging to their respective Officers, of which fees each court is most certainly the properest judge.

2 *Keble* 615, Spiritual court has jurisdiction to try extortion in taking fees.

For the prohi-
bition.
Salk. 330,
333.

Darnell for the prohibition.

As to the cases quoted ; *non negandum* but there have been resolutions that way : but the point is now settled in the case of *Johnson* and *Oxendon*, 4 *Mod.* 254, where most of the cases now quoted are taken notice of ; and this reason given by chief justice *Holt*, that if proctors might sue in the spiritual court for their fees, they would avoid the statute of limitations.

In the case of *Brioker* and *Goodall*, a prohibition was granted, *P. 266*, where a woman was sued for fees, in a cause * carried on by her, against her husband ; in order to bring the matter judicially before the court.

As to the case of extortion ; no weight to be laid upon it ; because no favour is shewn to so odious a crime.

As to the arguments from the reason of the thing ; if they prove any thing, they prove too much, viz. that a proctor cannot sue at common law.

Court.
1st point.
Often not ne-
cessary, to
join the hus-
band with the
wife, in suits
in the spiritual
court ; because
the husband,
tho' not na-
med may come
in *pro interesse*
suo, and make
defence him-
self, should the

Parker chief justice. If the spiritual court has jurisdiction, perhaps not necessary by the forms of their law, for the husband to be named in the suit ; as in the case of an executrix. And the reason of the difference between the common law and the civil law, is this, that in the spiritual court, the husband, tho' not named, may come in *pro interesse suo*, and make defence himself, should the wife desert the cause.

Whether therefore the husband must be joined, must be determined by the spiritual law ; and may be a good cause for an appeal, but can be none, for a prohibition.

2d point.

Whether the fees may be sued for in the spiritual court, a matter much litigated ; and resolutions both ways.

Judge

Michaelmas Term 1 Geo. I.

Judge Eyre. No suing in the court of admiralty, or court of honour for fees. Case of *Donvill and Oldish*, prohibition granted by all the judges of England.

Judge Pratt. I see no reason, why fees in the spiritual court, may not be recovered at common law, as well as fees in chancery.

Adjournatur.

* *Potter and Pinkney*. B. R.

* P. 265.

TO an action of trespass for goods taken and carried away, the defendant pleads that he was seised of such a lease; but in conveying his title to the lease, sets forth such matter, as shewed the lease to have determined, before it began; then goes on, and says, that virtue of such a lease, he entered and made a lease to the plaintiff, reserving such rent; and for the rent behind justifies the taking &c. Plaintiff replies, that the goods distrained were sold. Defendant in his rejoinder, justifies the sale, by virtue of a late act of parliament. To this rejoinder plaintiff demurs; and the defendant joins in demurrer.

Action of
trespass.
Pleading.

For the plaintiff it was insisted, that there was no good title set forth to the lease, in the plea; but matter directly destroying it, and that the first lease failing, the second must do so too.

Exception to
the defense;
dane's plea.

To which it was answered, 1st. That if the defendant has failed in deriving to himself a lawful ability to make the lease to the plaintiff, the consequence will only be, that that entry, which he sets forth to be virtue of the lease, must be taken to be a disseisin, and a tortious fee-simple, sufficient to support the lease.

Answer.

2^{dly}. It was said, That the plaintiff by his replication, tho' he had not said, *bene & verum est*, the defendant made such a lease &c. yet by pleading such matter as abuse of the distress, (matter confessing and avoiding the plea of the defendant) that plea must now be taken for true; as that there was such a lease made, and the rent behind. And Court of this opinion were the court.

* It was said moreover by chief justice *Parker*, That the title was but matter of conveyance or inducement; that the substance of the plea was the lease, and the arrearages of rent.

* P. 266.

Then exceptions were taken by the plaintiff's counsel to the rejoinder.

Exceptions to
the defend-
ant's rejoinder.

1st. That notice should have been given to the owner of the goods; der. not to the lessee.

2^{dly},

Michaelmas Term 1 Geo. 1.

2dly, Notice in the statute must be understood to be notice in writing ; but not set forth in the pleading, that this was notice in writing.

The fatal exception.

3dly, Said in the pleading, *quod immediate post districtionem sic captam*, he left notice of taking &c. & *pro causa inde* ; whereas the cause should have been set forth.

Answer.

As to the 1st objection ; it was over-ruled by the court, who held, That the Statute did not require notice to be given to the owner, for he might not be known ; but to the lessee.

As to the 2d objection ; it was said by the counsel for the defendant, That if the word notice did in the act import notice in writing, it must do so too in the plea, which pursued the very words of the act.

3d objection good.

But the 3d objection to the rejoinder was by the court held fatal, for that it was direct nonsense ; and that if it had been *cum causa*, tho' that had been sense, yet it had been insufficient ; for the court ought to be informed upon the pleading, what the cause was that was left.

Judgment *pro quer.*

Brantbwayt pro quer. Salkeld pro def.

* P. 267. * Weddall and Manucaptors of Jocar. B. R. See Post 303.

Action brought upon recognisance entered into by bail ; they plead death of principal *ante emanationem brevis*. Question whether this be a good plea.

ACTION brought in *B. R.* a recognisance entered into by the bail, to render the body of the principal or pay the condemnation ; judgement against the principal for 105 *l.* for damages and costs ; writ of error brought into the exchequer-chamber ; judgment affirmed, and 9 *l.* additional costs given for the delay &c.

Now a *scire facias* is brought against the bail upon this recognisance ; the bail prays oyer of the recognisance, which is set forth, &c. And then the bail pleads the death of the principal *ante emanationem brevis* ; to this plea plaintiff demurs, because *duplex placitum & carens forma*.

For the plaintiff.

Mr. Fortescue insisted for the plaintiff, That this plea was naught ; because it was impossible for any material issue to be joined upon it. For tho' if the jury find the death of the principal at the time of the *capias* issuing out, it would make all right ; since he that died before the issuing out of the *capias*, died certainly before the return of it ; yet should the jury find the contrary, that he did not die before the issuing &c. What is the plaintiff the better ? Since he might be alive at the issuing out of the *capias*, and dead at the return. Now shall a plaintiff be compelled to take issue upon a matter, which if found against him, he is gone ; but if found for him, he is never the nearer ?

This

Michaelmas Term i Geo. I.

This is the very case of debt upon bond, and *solvit ante diem* pleaded, in the cases of *Atwood* and *Coleman*, and *Meril* and *Josselyn*. Ant. 147. Held, that in such cases, there is no way for the plaintiff to help himself, but by demurrer.

* *Brantbwayt pro def.*

The condition of the bail-bond is either to render, &c. or pay the condemnation.

To be considered what pleas are good and proper for the bail.

1st, The condition of the recognisance being in the disjunctive, he may plead the performance of either part of the disjunctive.

2^{dly}, By way of excuse for not performing, he may plead the death of the principal, before any *capias* issued out; or the death of the principal after the issuing out of the *capias*, and before the return.

For the condition of rendering, is not to be understood of rendering the body of the principal, immediately after judgment against him; but rendering upon demand by due process of law, viz. the return of the *capias*. The issuing out of the *capias* is the beginning, and the return of it, is the completion of the legal demand.

W. Jones 29. Death of the principal before the issuing out of any *capias* pleaded; demurrer, and judgment for the bail. And this difference taken, that when a condition is in the disjunctive, if one part of the condition becomes impossible by act of God, the obligor is discharged from the performance of the other part.

Hutton 47. *Moore* 432. Death before the issuing out of the *capias*, is certainly death before the return.

As to the duplicity of the plea; the answer is that no advantage can be taken of it; because but matter of form, and aided upon a general demurrer. And this is no other; for tho' it be said *quod placitum est duplex & caret forma*, that not enough; for no advantage to be taken of a double plea upon demurrer, without setting forth in the demurrer, wherein the doubleness of the plea consists. So determined in the first case in *Lutwyche's Reports*.

* Chief justice *Parker*.

Rendering is to be understood rendering upon demand, viz. at the return of the *capias*; for then is the legal demand compleated. Not rendering then, is a refusal; and then the bail becomes liable and not before. Pleading therefore the death of the principal before the return of the *capias*, is most certainly a good plea.

But pleading the death of the principal before the issuing out of the *capias*, is certainly an immaterial plea; because material only in case it be found one way. For death before the issuing out of the *capias*, is death before the return of it. But suppose it be found, that the principal did not die before the issuing out of the *capias*, that is plainly nothing to the purpose; for notwithstanding this he may die before the return of the *capias*.

* P. 268.

For the defendant.

See an exception to this rule in *Salk.* 170.

* P. 269.

Michaelmas Term 1 Geo. I.

As for the authorities, wherein the pleading is, death of the principal before the issuing of the *capias*; this answer may serve, that the objection was never taken; and that the doubt in those cases was, whether the bail was not bound to render the principal, in convenient time; or had time to do it, until the issuing out of the *capias*. This objection therefore, the strength of which lies upon this, that the principal has time until the return &c. would have been absurd, at a time when it was a controverted point, whether the bail had time until the issuing out of the *capias*. But now the law is settled, that he has time until the return. The case at bar, exactly the same of *solvit ante diem* pleaded to a bond.

Doubted formerly, whether the bail had time for rendering the principal until the issuing of the *capias*, tho' it be now settled that he has time until the return.

The rest of the judges being of the same opinion, the plaintiff would have had his judgment, had not another objection been started, *viz.* That the *scire facias* sets forth all the process until judgment in the court of B. R. and likewise all the proceedings upon a writ of error, until affirmance of the judgment, and the damages and costs in both courts; and concludes with a demand for *predict dampni mis. & custag'* in both courts; whereas bail not liable for those in the exchequer-chamber. 1 Rolle's Abr. 335.

Objection to the *scire facias*.

* P. 270.

Bail not liable for costs upon error.

Court. If judgment be general, execution must be so too; but since the sums are in their own nature several and distinct, why may not the court enter the judgment *pro dampni mis. & custag'* in Cur. *Dam. Reg. Banc. recuperat.* See Post. 303.

Shuttleworth and Patterson. B. R.

Writs.
Motion to set aside writ of inquiry.
Defects in form may abate original but not judicial writs.

THIS was a motion to set aside a writ of inquiry for want of these words, *Et habeas ibi hoc breve.*

Court. It is well enough. A known difference between original and judicial writs, that defect in form will abate the former, but defect in substance only can the latter; and thus resolved in *Blackmore's case*.

The substance of the writ, is only to command the sheriff, to take an inquisition; and the words omitted purely directory to the sheriff; because without returning the writ, it cannot appear to the court, that he had an authority to take the inquisition; and if the writ be returned, as here it is, all the ends of those words, now omitted, are effectually answered.

Besides, a command to return the inquisition, is virtually and consequentially a command to return the writ; because the inquisition cannot be returned to any purpose, unless the writ be so too; for it cannot otherwise appear, that it is a return to the writ, or that the

sheriff

Michaelmas Term I Geo. I.

sheriff had any authority for taking the inquisition. *Si sibi viderit expedire*, left out in *scire facias*, yet * held good for the very same * P. 271. reason, viz. being a judicial writ; which shall not be abated for want of form.

King and Miles. B. R.

THIS was a motion to quash an order of bastardy.

Motion to
quash an order
of bastardy.

1st Objection against the order was, That it should have been set forth, what place the child was born at; because that gives the justices their jurisdiction.

Court. The adjudging such a one the father of a bastard child, which was born in such a town, is a sufficient setting forth the place of his birth.

2^d Objection. Parish out of time; the child fourteen years of age.

Court. The parish not confined to any time by the statute; and good reason set forth in the order, why the parish did not complain sooner, viz. that the father ran away, and could not be found sooner, and having no estate, nothing could be done in his absence.

facies of
bastardy, the
parish not
confined to
any time for
complaint.

3^d Objection. Awarded by the order, That the father shall give security, both for the performance of the order, and likewise for indemnifying the parish for the future.

Court. The giving security a thing very reasonable in itself; but since there have been former opinions of the court, that the justices have not a power, to award the giving security for the due performance of their order, until such time as their order has been contemned, (but then they have) the order must be quash'd *quoad* that: but as for giving security for indemnifying the parish, it is right.

Salk. 66.
Order to
give security
for perfor-
mance of the
order, naught.

* Parishes of Newark and Worksworth, in Com' * P. 272. Derby. B. R.

ONE *Wheatcroft* with his wife and children, were by an order of justices removed to *Worksworth*, as the place of their last legal settlement.

Motion to
quash an order
for settlement.

Upon an appeal to the sessions, it appearing *Newark* was the last legal settlement of *Wheatcroft*, and consequently of his wife and children, they are therefore all removed to *Newark*.

The

Michaelmas Term I Geo. I.

The court was moved to quash the order of sessions *quoad* children; because it was no consequence that *Newark* being the last legal settlement of the father must be so of the children; for they might have gain'd a new settlement.

Court. This not to be supposed.

Cottingham and Lofts. B. R.

Motion for prohibition.

MOTION for a prohibition; suggesting, that where there is a dispute between a peculiar and the prerogative court, whether *bona notabilia* or not, it must be tried by the common law. *1 Mod.* 211.

Bona notabilia

Court. This must often have happened; and if a prohibition lay, there must have been frequent instances of it.

Different rules in spiritual and common law, reason of granting prohibitions *pro defectu triationis*.

Where a prohibition is granted *pro defectu triationis*, it is upon supposition of different rules established by the spiritual and common law; as in case of prescription: but as to *bona notabilia*, the spiritual and common law the same.

Case quoted not much regarded.

Hilary Term.

* P. 273.

I Geo. I. B. R.

Walter and Warren.

THIS was an action brought by the husband for taking his wife away, and ravishing her, *per quod consortium, &c. per magnum tempus, viz. per spatium unius anni amisit, &c.* Verdict *pro quer.* and general damages given.

Motion is arrested of judgment.

Moved in arrest of judgment, that a year had not expired, from the 1st of October, the time of the offence, to the time of the verdict, and much less at the time of the action commenced; and therefore, general damages being given, it was erroneous.

If general damages be given, where by law none can be given for part, judgment must be arrested.

Hobart 189. 1 Mod. 271. Horn ver. Chandler. Moore 887. 2 Saunders 169, Hambleton and Veere; a case full in point.

On the other side it was said, That coming under a *per quod*, it was only consequential, and laid by way of aggravation of damages, and was not the cause of action; that the *per magnum tempus* was enough, and the *viz. per spatium &c.* should be rejected as surplusage, because impossible.

* Parker chief justice. This case widely different from the common cases of *viz.* a time that is altogether impossible; as the 30th of February, &c. for here the whole time is not impossible; and it cannot be known for how much of it the jury gave the damages; most probably to the time of the verdict. *Adjournatur.*

* P. 274.

Hilary Term I Geo. II.

Holroi and Ebizfon. B. R.

Court moved
for defendant
in error, to
have interest
of the damages
from the time
of the judg-
ment, pending

ACTION brought in the court of common pleas, upon several promises; judgment by default; writ of inquiry executed, and 424 l. damages given. Error brought into the court of B. R. Plaintiff in error non proced.

Writ of error, allowed him over and above his costs. Resolved that he should not.

Stat. 3 H. 7.
cap. 10.

The court was moved upon 3 Hen. 7. cap. 10. that the defendant in error, should besides his costs have interest allowed him, for the sum adjudged due to him, pending the time of the writ of error, from the judgment.

In actions of
debt, interest
allowed by
way of da-
mages.
Where judg-
ment is by
default, court
may give the
damages,
without a
writ of in-
quiry.

In the statute lately made concerning promissory notes, the word *damages* has been extended to interest.

Action of debt; judgment by default; interest allowed by way of damages, *occasione detentionis debiti*, 2 Saunders 106. Where judgment is by default, court give the damages, without putting the party to the trouble of a writ of inquiry.

The entries of costs and damages in writs of error, seem to favour this construction.

Co. Entries 24. b. the entry is *pro missis custagiis & dampnis*, which he had by reason of the delay.

Cro. Car. 145. A *quart impedit*; where a writ of error pending a year, the value of the living for a year, was given in damages, by reason of this very statute.

* P. 275.

Stat. 27 Hen.
cap. 8.

* It is true, that in writs of error into the exchequer chamber, interest not allowed; but this writ of error is given by 27 Eliz. cap. 8. and therefore not affected by Stat. of 3 H. 7. cap. 10.

Econtra.

On the other side it was said, that this was a matter of importance; for the arguments if good, hold equally in all actions, as well as this.

The preamble takes notice of writs of error being frequently used, only for delay; and the body of the act gives the party costs and damages, only for this wrongful delay and vexation.

A writ of er-
ror, is a writ
of right.
Salk. 504,
264.

A writ of error is a writ of right; it is founded upon the fallibility of mankind, and a just policy, that a man had better be a little longer kept out of his money, than a wrong sentence given.

Post. 281.

This act and all others that lay restraints upon writs of error, have received a strict interpretation; because restrictive of the common law; for which the counsel referred himself to cases, quoted in the case of *Hamond and Webb*.

From the purview *constat*, That the design of the act was only to restrain the abuse of writs of error, and ought to be extended only to those, that are brought for delay.

The

Hilary Term I Geo. I.

The words in the act, at the discretion of the justices, &c. shew plainly, that the damages intended by the act, must be such damages as are uncertain in their nature ; but legal interest is a certainty.

Costs and damages are in law synonymous terms ; damages do *prima facie* signify costs ; tho' sometimes *ex necessitate rei*, it is extended to signify that damage which is the cause of action, Co. 10 Rep. 115. b. Pilford's case, In an action of debt, brought against an executor, the word *damna* in the judgment signifies the costs.

Damages and costs are sometimes synonymous terms. 3 Salk. 215.

As to 2 Saunders 106. the reason given there, will not extend to this case ; and proves no more, than that the court may do it, not that they will or must.

As to the forms of the entries *pro damnis & expensis* ; they follow the words of the act, but do not prove what the import of the word *damna* is, whether it is, or it is not synonymous with the word costs.

* P. 276.

To the case of 3 Crp. 145. Dyer 77 ; it was answered, that it does not come up to the reason of this case. 1st, Because this value was there in its own nature certain, and so much made of it by the other side ; but here by no means certain what interest would have been made of the money. 2^{dly}, To have made that case come up to this, not only the value, but the interest of that value should have been allowed.

It was admitted, That the practice of the court of exchequer, upon writs of error, is otherwise ; and a poor reason offered to account for that difference.

For 1st, the statute of 3 H. 7. says, all writs of error ; and will therefore comprehend all subsequent statutes, relating to writs of error.

2^{dly}, Three precedents of the entries of the judgments cited, were of judgments in the exchequer : now if that court think themselves obliged to follow in their entries, the words of this act, then sure they think the act extends to them.

As to inconveniencies ; the question is not about them, but what the law is. Writ of error, judgment reversed, and restitution awarded ; very reasonable there should be a recompence, but there is not.

It is true indeed, That in debt, a jury will be directed to give the interest in damages ; but tho' this be done in debt, it is never done in other actions.

The costs are ascertained by the judgment, as well as the damages ; and therefore interest by parity of reason, ought to be allowed for those ; but this not pretended to.

The words of the statute are general, *any writ of error* ; yet some cases resolved out of it ; for example, an executor, or administrator, shall pay no costs at all in writs of error, tho' the judgment be *de bonis propriis*. Mich. 5 W. & M. Gale and Till, 3 Levinz 375.

It may be a question whether it can be judicially taken notice of, that any interest is lawful. 1 Vent. 198. Seaman and Dee ; action of

* P. 277.

Executors and administrators pay no costs in writs of error, tho' the judgment be *de bonis propriis*.

debt

Hilary Term I Geo. II

debt will not lie for money and interest. From whence it should seem, that originally and judicially, interest is not to be taken notice of.

Reply.

It was replied, That the *quantum* of the interest to be allowed, was in the breast of the court. That the act was a remedial law; and therefore ought to have a liberal construction. That tho' *damna* does sometimes signify costs, yet when joined with *custodia*, it must have a different signification; and they are distinguished in every *posse*, damages so much, costs so much. *Vide the Entries.*

Court.

Parker chief justice. No man sure of making interest of his money; a man cannot always place his money out to his mind; he may lose the principal; and wherever interest is made, a hazard is run: but here is no hazard at all; very low interest when this act was made.

However, if this were a new case, I should think it highly reasonable, That damages should be given for the delay; the word costs in the act, seems to me to relate to vexation, and damages to delay.

By the common law, in every action of debt, damages are given, *occasione detentionis debiti*, either by writ of inquiry, or by the court.

Where a penal sum is recovered, damages are never given. But upon a single bill, even by the common law, damages are given for the delay.

This a key to the statute. Whenever a man is kept out of his just debt, the law implies and supposes a damage. I doubt only by reason of the different practice in the exchequer.

* P. 278. * Afterwards in *Trinity* term, it was resolved by the whole court, That the defendant, upon a writ of error, brought into *B. R.* should not have interest allowed him, by way of damages, for the sum adjudged due to him, from the time of the first judgment, pending the writ of error.

All interest
reputed un-
lawful in the
time of H. 7.

For at the time of making the statute 3 *H. 7. cap. 10.* which gives the damages upon writ of error, all interest was reputed unlawful; and therefore that statute could not give it.

In fact, when interest run highest, as at 10 per cent. interest has not been allowed.

In writs of error brought into the exchequer-chamber, interest never allowed; and a uniformity in practice to be wished and endeavoured.

King

Hilary Term I Geo. I.

King and Tomb. B. R.

COURT. If recognizances are estreated into the exchequer, because not punctually complied with; yet if the party appears and takes his trial next session, he may compound for a very small matter in the court of exchequer; because the effect, tho' not the exact form of the recognizance, is complied with.

Recognizances. Where they may be compounded, after they have been estreated.

Judges of oyer and terminer the proper judges, whether recognizances ought to be estreated or spared.

Judges of oyer and terminer, proper to determine, whether they shall be estreated, or not.

No instance can be produced, of any *certiorari*, to remove a recognizance for appearance, from judges of oyer and terminer; and it would be to take away a jurisdiction that properly belongs to them.

No certiorari ever granted to judges of oyer and terminer, to remove recognizances for appearance.

It is for the advantage of publick justice, That it should be in the power of justices of oyer and terminer, to spare the recognizance, if upon the circumstances of the case they see fit.

* King and Inhabitants of Bury-Pomroi. B. R. * P. 279.

A Poor child of the parish of *Stock-Fleming*, is by the church-wardens bound an apprentice to *A.* in that parish; and there lives with his master two years. Then *A.* removes to the parish of *Bury-Pomroi*, but gains no settlement; and there the apprentice serves out the remaining five years of his time.

Settlement. Salk. 333. 8 Mod. 168. 169. 60, 61.

Held, that this was a settlement of the apprentice in the parish of *Bury-Pomroi*; and that it was not necessary, that the binding and service should be in one and the same parish.

The statute 12 *Annæ*, whereby it is declared, That a servant can gain no settlement, unless the master does, relates only to certificate masters.

King and Weston. B. R.

THIS was a conviction before justices, for killing of conies in a warren inclosed.

Conviction for killing of rabbits.

It was moved to quash this conviction; 1st, Because the statute 3 *Jac.* 1. 13. which relates to warrens inclosed, does not give this summary way of proceeding by conviction; and the statute of 22 *Car.* 2. 25. which does authorize that way of proceeding, relates not to warrens inclosed.

The words of the statute are to this purpose: For as much as conies are destroyed in warrens and grounds not inclosed; by reason the same is not prohibited by the statutes in that case provided, which extend only to grounds inclosed; therefore it is enacted, That

Hilary Term I Geo. I.

whoever shall wrongfully enter into any warren or ground lawfully
 * P. 280. * used for keeping of rabbits, tho' the same be not inclosed, &c.

Stat. 22 Car.

2. esp. 25.

extends to

warrens in-

closed; for

the words

"not inclo-

sed", are

not restrictive.

Court. Conviction well warranted by this latter act; for where-
 as the former was a partial, this is an universal law. *Into any warren.*
 This satisfies the preamble. A vast difference between the words *not*
inclosed, and *tho' not inclosed*; the former are restrictive, but not the
 latter.

Unless this act extends to warrens inclosed, they would be in a
 worse case, than those not inclosed; because then an offence in the
 latter would be punishable by the short way of conviction before justi-
 ces, but not the former.

2dly Objected, Summons naught, for want of time given the party
 to make his defence.

Answer; Reason of summons, and giving time, founded on natu-
 ral justice, that a person may have an opportunity to make his de-
 fence; but this conviction being founded upon confession of the party,
 the objection vanishes.

Haiton & al' Assignees *versus* Jeffreys. B. R.

Motion for
 leave to plead
 and demur;
 but refused,
 for demurring
 is not plead-
 ing.

THE court was moved for leave to plead a plea, and demur
 to the declaration, at the same time, upon the 4th of *Ann*
 the words are, 'That it shall be lawful for any defendant, or tenant
 in any action or suit, or for any plaintiff in replevin, in any court
 of record, with the leave of the same court, to plead as many sever-
 al matters thereto, as he shall think necessary for his defence.
 Provided nevertheless, That if any such matter shall, upon a de-
 murrer joined, be judged insufficient, costs, &c.'

* P. 281.

Court. The words of the act of parliament are, 'That it shall be
 lawful to plead as many several matters, &c.' Now a demurrer is so
 far from being a plea, that it is an excuse for not pleading. Here
 you plead, and at the same time pray that you may not plead. The
 word *matter* imports a possibility that the other party may demur to
 it; but there can be no demurrer upon a demurrer. This never at-
 tempted before.

There can be
 no demurrer
 upon a de-
 murrer.
 Salk. 219.

Hammond and Webb. B. R.

Special bail.

HAMMOND gave a bond to Patchell, conditioned for the
 payment of so much money by Webb; Webb gives a bond to
 Hammond, conditioned thus: *Whereas* Hammond has given a bond to
 Patchell,

Hilary Term I Geo. I.

Patchell, for the payment of so much money at such a day, by him the said Webb, the condition of this obligation is such, that if the money be paid by Webb, according to the condition of the said bond, then this obligation is void; otherwise, &c. Action brought upon this last bond; judgment for the plaintiff; writ of error brought.

The court was moved by Serjeant Salkeld, That upon this writ of error, the plaintiff in error should find special bail by virtue of 3 Jac. 1. cap. 8. The words are, *No execution shall be stayed on any writ of error or supersedeas, for reversing a judgment in any action of debt, or contract for payment of money only, unless, &c.* Now here the bond is conditioned for the payment of money only; for the condition properly speaking, begins at these words, *The condition of this obligation is such*; what went before only recital.

Question whether special bail was to be put in by plaintiff in writ of error, by virtue of Stat. 3 Jac. 1. cap. 8. 8 Mod. 122.

We are therefore within the very words of the act; and if so, I am sure this court will not construe us out of the meaning of the statute; for this is a remedial law, and ought therefore to have a large and liberal construction. Writs of error are in delay of that right, which the judgment has given the party; and therefore have always been looked upon by the common law, with an evil eye.

Whether the statute ought to be expounded by equity? P. 282.

Statute of *Marlebridge* a penal law; and yet because a remedial law, it has been interpreted by equity. That act says, *Firmarii non faciant vastum*, and it has been resolved that the word *firmarii* should extend to strangers; and that this act extended to waste *omittendo*, tho' the word is *faciant*, which literally imports active waste.

Statute of Marlebridge.

Serjeant *Brantbwynt contra*.

This act ought not to be taken by equity; because it is to take away, or clog a remedy, that the party has by common law. And for this very reason, there have been cases ruled, that this statute should not be taken by equity. In case of *Garret and Danby*, action of debt upon an award, held not within the statute, *Shower* 14. 2 *Kemble* 131.

Econtra.

He mainly relied upon this difference, where the bond is conditioned for the payment of money in discharge of a debt, and where the payment of money is in discharge of some other collateral matter. *Tout temps prist* must be pleaded, notwithstanding a tender, where the money is to be paid in discharge of a debt; *contra* where the bond is in discharge of a former bond. This difference taken *Co. Lit.* 207. a.

The condition of this bond, the same as to save harmless; which without doubt out of the act. 3 *Bulstrode* 234.

Parker chief justice. This bond stands only as a security for damages; this bond may be discharged, and the plaintiff not paid one penny; no difference between this and a bond to save harmless; out of the meaning of the act.

Court.

Hilary Term I Geo. H

* P. 283. * *Pratt* judge. The only question is, whether the case be within the meaning of the act; for no matter whether within the words or not. And it seems to me, that the present case, tho' possibly within the words, is out of the meaning of this act, which is plainly this, that where a recovery does necessarily import a debt due, *there* this act takes place; but not where a recovery may, or may not, import a debt due; and the reason is, that delay in the latter case is not esteemed so prejudicial, as in the former. *Adjournatur.*

Nutton versus Crow. B. R.

Writ of error.

THIS was a writ of error directed to *Thomæ Domino Trevor capital' justic' suo de Banco*; and the return was *Respons. Thomæ Trevor Mil' capital' justic' infranominat', &c. Placita irrotulata coram Thomæ Trevor Mil', &c.*

Motion to quash the writ of error.

The court was moved to quash this writ of error, by Serjeant *Whitaker*.

Because *Thom. Trevor Mil'* the person that returned the record, could not possibly be the same person with *Thom. Dom. Trevor*, to whom the writ was directed. *Yelverton* 211, where, tho' a record before a bishop and seven, is a record before a bishop and six; yet the writ of error quashed, because wrong described.

Salk. 50.

Cro. Car. 371, held, that *Henry Ferrers* knight, and *Henry Ferrers* baronet, cannot be intended to be one and the same person.

Dyer 300, Lord *De la War's* case, was also cited. 2 *Cra.* 341, writ of error directed to *Thomæ Fleming capital' justic' ad placita*, quash'd, because *coram nobis tenend' assignat'* omitted.

If it be objected, that there is but one chief justice of the common pleas; the answer is, that a writ of error cannot be directed to the chief justice by name, * of his office, but his natural name; and the reason is; because if no return be made to the writ of error, there goes an *alias*, then a *pluries*, and then an attachment, which must be directed to him by his natural name. And the case is stronger here; because there is no attachment against the person, but the goods of a peer.

* P. 284.

Serjeant *Salkeld contra*,

Econtra.

Latch 161, a commission of *nisi prius*, to *Francis Harvey Armigero*, one of the justices *Dom. Reg. de Banco*; the return was, that the trial was before *Francis Harvey Milite*, one of the justices, &c. yet held well. 1st, Because he might be *Armiger* at the time of the issuing out that commission; and *Miles* at the time of the trial. 2^{dly}, Because otherwise all the trials of the circuit would be overthrown.

As to the case of Lord *De la War*; that was determined wholly upon the pleading.

He

Hilary Term i Geo. i.

He agreed, from the authority of 38 H. 6. i. and *W. Jones* 346, That Knight and Esquire, and Knight and Baronet, could not be one and the same person. But that such a one *Miles*, and such a one *Dominus*, might be one and the same person; he quoted the *Register* 287. b. where the same person, in the same writ, is called in the beginning of writ *Miles*, and in the latter end of the writ *Bara*. He quoted also *Savill's case*, *Cro. Car.* 205.

Parker chief justice, with the consent of the rest.

Court.

The writ of error must be quashed.

Names are for the distinguishing of persons. Such a one *Miles*, and such a one *Dominus*, two different names; and therefore to be intended different persons. In records and legal proceedings the whole name to be set forth; and therefore *Thom. Trevor Mil* here in the *Placita*, must be intended of such a one *Mil* who was no lord.

The different additions of Mil. or Dom. make different names, and must be understood of different persons.

* As to the cases cited, and the difference taken between them and this, viz. That the same person may be both *Miles* and *Dominus*, but cannot be Esquire and Knight, or Knight and Baronet; the true distinction is, that where this alteration has been made in the addition and held good, both the additions have become consistent, by reason of the difference of the times; since he who was Esquire at the time of the writ directed, may be a Knight at the return; and so all those cases may remain good authorities.

* P. 285.

As to the *Register*; nothing to the purpose. For the writ is only a direction, that he who at the beginning of the action was *Miles*, was now become a peer, and that the process should hereafter be against him as a peer. That writ does not import, that the same person was, at the same time, both Lord and Knight (tho' that be true) but that he who before was only a Knight, was now a Lord.

As to the objection, that the office ascertains the person, there being but one chief justice of the common pleas; I answer, that we must not judge by our own knowledge, or the knowledge of any body else; but by the record. Besides, *Flemming's case* a full answer to this objection.

The case of *Rider* and *Broderick*, the same with this, and the court of the same opinion; but no judgment entered.

Afterwards in the same term, two more writs of error, viz. *Fuller* and *Davis*, *Alexander* and *Symonds*, quashed, for the same reason.

Aylworth and Woolley. B. R.

ACTION brought in the court of C. B. upon three several promises; the 1st for 55 l. the 2d for 65 l. and the 3d for 65 l. The defendant pleads as to part *non assumpsit*, and as to part in abatement * thus, viz. quoad 50 l. of the 1st promise, 60 l. of the * P. 286.

VOL. X.

D d d

2d,

Hilary Term 1 Geo. I.

2d, and 60 l. of the 3d, *quod breve cassetur*; because there were three actions depending in the court of exchequer for the same sums. Judgment of *respondeas ouster* given in the court of common pleas.

Upon error brought, court of B. R. of opinion, that the judgment in the common pleas was well given; for a plea in abatement must go to the whole, and not to part; and the three actions depending in the court of exchequer might have been pleaded in bar of the whole.

— versus Ormiston. B. R.

Action upon
bill of ex-
change.

IN an action brought upon a bill of exchange, made payable to the order of the plaintiff, the declaration set forth, that the defendant, by his acceptance, became liable to pay it to the plaintiff, *secundum consuetudinem mercatorum*. Upon this declaration there is a demurrer.

For the de-
fendant.

It was urged for the defendant, that the plaintiff had only an authority to indorse the bill, and then the indorsee might maintain an action; but that the plaintiff was not entitled to receive the money. It was compared to the case of a devise, that executors shall sell land, where the executors have only an authority to sell, but no interest; and therefore immediately upon sale, the vendee is in, not from the executors, but under the will.

For the plain-
tiff.

On the other side it was said, that if this was law, multitude of bills of exchange would be overthrown; that by the custom of merchants, there is no difference between payable to the order of such a one, or payable to such a one, or order; and that the custom is confessed by the demurrer.

* P. 287.

That the same strictness and nicety are not required in the penning of bills, current between merchant and merchant, as in deeds, wills, &c.

S.lk. 443-
Usage of mer-
chants, of
what force in
law.

In policies of insurance, warranted to depart with convoy, has been resolved to import a continuance with that convoy, as long as may be; and this not *ex vi termini*, but because understood in this sense by merchants.

A grant or de-
vise of the
profits of
land, will
carry the
land with it.

Court. Even in case of land, a grant or devise of the profits of land, carries the land: order implies property; no difference between having a power to dispose of money, and having the money itself. What is an order, but an authority to appoint the payment of it? which the plaintiff here does to himself.

Judgment pro quer.

Parishes

Hilary Term 1 Geo. 1.

Parishes of Brightwell and Henley. B. R.

THREE weeks after Michaelmas, a servant is hired until Michaelmas following; and upon Michaelmas he was hired for a year until next Michaelmas, but did not serve out the year; but his service in both years was above a year.

Settlement.
Stra. 33.

The question was, whether this was a settlement. For tho' here was a hiring for a year, and a service for a year; yet it was not a year's service subsequent to that hiring.

Parker chief justice, the rest concurring. It is a settlement; for here is a hiring for a year, and service for a year, tho' not under that hiring; which resolved not to be necessary, in the case of Overton and Steepleton.

Service for a year, and hiring for a year, tho' the whole year's settlement.

Service be not subsequent to that hiring.

A servant, during a whole year, is hired from week to week; then is hired for a year, and serves one week; this is no settlement, for want of continuance in the service 40 days after the second hiring.

But where there is not 40 days service under such hiring, no settlement.

* Kitton and Fag. B. R.

* P. 288.

THE case was, one Hamlin, high-sheriff, did by a legal instrument, make Lancaster his under-sheriff, in trust for Altham, who had been under-sheriff the year before, neither Lancaster nor Altham took the oaths required by 27 Eliz. cap. 12. After Hamlin's year was expired, and before a new sheriff appointed, Altham makes an assignment of a bail-bond, and the question was, whether Altham was such a person, as that his assignment of the bail-bond was a good assignment within the statute for the amendment of the law.

Stra. 60.
Of assignment of bail bonds by sheriffs.

And of de facto sheriffs.

Question.

N. B. Altham always acted as under-sheriff, and Lancaster not at all.

Mr. Robins argued, that this assignment was good.

This case to be resolved into two points.

1st, Whether it is necessary that this assignment be made by the high-sheriff in person?

2dly, If it be not, whether this assignment being made by Altham the under-sheriff de facto, be not a good assignment?

It was formerly a doubt, if the sheriff returned a *cepi corpus*, (as he must, notwithstanding by the statute of 23 H. 6. cap. 10. he is obliged to bail him) and has not the body in court, at the day of the return,

Hilary Term I Geo I.

return, whether he was not liable to an action. Law not settled in this point until 21 & 22 Car. 2. 1 Vent. 55. when resolved, that he is not liable to an action.

In the statute for the amendment of the law, tho' under-sheriff not mentioned, yet he is far from being excluded; he may possibly be included under the words, *other officers*.

In all ministerial acts, whatever is done by the under-sheriff, of the same authority, as if done by the sheriff himself. *Hob. 13. 3 Bullstr. 77. 9 Co. Rep. 48. 8 H. 4. 20.*

* P. 289. * Assignment of bail-bonds to the plaintiff, no new thing. A common practice before the statute; and tho' in strictness of law, a bond being a chose in action, such assignments were not good, yet such assignments have been taken notice of in courts of law, and not suffered to be evaded. *Fogler and Jackson, 22 Car. 2.*

Of the Act about the assignment of bail-bonds by the sheriff. This act not in nature of an authority to the sheriff; but a judgment in parliament, that the sheriff shall do it, and he is liable to an action if he do not; and in chancery may be compelled to a specific performance, according to this act of parliament.

Two reasons for making this act of parliament: the one to obviate the abusive practice of sheriffs, in releasing these bonds; and thereby cutting off the plaintiffs from the advantage of them, for whose security alone they were taken. The 2d reason was to remove the chicane of the law, that these bonds were not assignable, because choses in action.

Had the statute only made the bail-bonds assignable, and not said by whom, the law would have said, that the sheriff was the person to assign it.

If the sheriff dies before assignment, shall not the executor of the sheriff assign it?

As to the objection, that may be made, that the circumstances, required by the act of parliament to be observed in assigning, make it necessary for the sheriff to do it in person: It may be answered, that the reason of prescribing these circumstances, was only to make the assignment more effectual; and to distinguish the assignments by virtue of this act, from those in use before; and may therefore be compared to fines. 3 Co. 88. But no design to abridge the power of the under-sheriff.

An under-sheriff, by virtue of his office, is included in several acts of parliament, tho' not named. *Westm. 2. cap. 11. 25 Edw. 3. cap. 17. Westm. 2. cap. 18. Elegit, Fitzb. N. B. 266. b. 4 Co. 64. 5. Fulwood's case.*

* P. 290. * Execution the end and life of the law. 5 Co. Rep. 92. This a mechanical part of the sheriff's office. *Cro. Car. 26, qui per alium facit, per seipsum facit.*

Maxims of Law.

Salk. 589.

2d point.

As to the 2d point, no more than this, whether all acts done by one that appears and acts as under-sheriff, should be void for want of

Hilary Term 1 Geo. I.

of some circumstances, that none think themselves obliged to inquire into, and concern the under-sheriff only.

Tho' there be an under-sheriff legally appointed; yet he not appearing, nor acting, it makes no alteration at all in the case.

Gaoler *de facto* bound to take care of the prisoners; and generally the law is so, that acts done by those reputed in authority, are good.

2 Inst. 381, 382. Cro. Eliz. 699, Harris and Jay. Moore 112.

Cro. Eliz. 34. — ver, Howell and others. 1 Keble 357. If acts

of under-sheriffs *de facto*, were void; in so many acts of parliament relating to sheriffs, some care would very probably have been taken about it.

Mr. Reeves, *contra*.

He insisted, that the oath to be taken, was an oath of office; that Lancaster was in a legal manner constituted under-sheriff; but that Altham had no deputation at all, but was a meer intruder.

He insisted, that the oath to be taken, was an oath of office: that Lancaster was in a legal manner constituted under-sheriff; but that Altham had no deputation at all, but was a meer intruder.

He insisted, that supposing the assignment performed during the year of Hamlin, might have been good; yet it would not now, being performed after. Moore 112. Yelv. 44. 2 Cro. 73. Moore 757. 34 H. 6. 3, 6. 1 Rolle's Abr. 894.

He took this difference, where a statute appoints any thing to be done by the sheriff, and prescribes no particular manner for the doing of it, that makes it necessary to be a personal act; there the under-sheriff may do it, tho' sheriff only mentioned: but where the manner and circumstances, enjoined and prescribed by the act, make it a personal act; there the *under-sheriff cannot perform it; which difference answers all the instances, brought from acts of parliament. * P. 291.

Then he insisted, that the statute enjoining the assignment, to be under the hand and seal of the sheriff, did make it a personal act.

Indeed in *Englefeld's case*, 7 Co. Rep. 11. it is held, that tendering a ring, is no personal act; but then, it is resolved in the Duke of Norfolk's case, there quoted, that the uses being revocable by writing under the proper hand and seal of the Duke, it was a personal act, and not capable of being performed by any body else. This case exactly the same with that at bar; except the addition of the word proper, which according to 1 Mod. 40. and 1 Ventris 128. makes no difference at all.

If the sheriff dies before assignment, his executor cannot do it. This is *casus omissus*; and the plaintiff must sue in the sheriff's name, as at the common law, before this act.

Adjournatur.

Whether the sheriff's executor may assign a bail-bond? Or whether the plaintiff must sue in the sheriff's name?

Hilary Term 1 Geo. I.

Reeves and Symonds. Coram Parker C. J. at Nisi Prius.

Witness. **T**HIS was an action brought by Reeves for a quantity of stockings, sold to Symonds. The defence of Symonds was, that it was not he, that bought the stockings, but his son, who sent them to France, in way of trade; and to prove this, he would have called his son.

Evidence. **Parker.** He cannot be an evidence; because here is an advantage made by way of trade; and to whom this advantage shall accrue, depends entirely upon this question, who made this contract? and now one comes to swear, that he made the contract himself.

* P. 292. * Serjeant Darnell. He may be a witness; because he will neither get nor lose by the event of this cause; for what is now given in evidence, cannot be given in evidence in another action.

Parker. This you have often said, and I as often answered. If an action be brought by a commoner for his right of common, shall another person that claims a right of common, upon the same title, be allowed to give evidence? No, and yet it is certain that he can neither get nor lose in that cause; for the event of that cause will no way determine his right. But tho' he is not interested in that cause, he is interested in that question, upon which the cause depends; and that will be a bias upon his mind. It is not his swearing the thing to be true, that gives him any advantage; but it is the thing's being true; and the law does judge, that it is not proper to admit a man to swear *that* to be true, which it is plainly his interest should be true.

Where persons are not immediately concerned in the event of a cause; yet if they be any way interested in the question upon which the cause depends, they must not be admitted as witnesses.
Hob. 92.
2 Vern. 375.
Easter

Reeves and Symonds v. Coram Parker C. J. at Wils.

Easter Term. P. 293

1 Geo. 1. B. R.

Parishes of Frencham and Pepperharrow.

THIS was the case of a settlement; and in the order of the Settlement, justices the fact was stated specially. Sett. Rem. 56, Fort. 322.

A servant was hired two or three days after *Michaelmas*, to serve until *Michaelmas* next; but he serves as many days after *Michaelmas*, as made his year compleat, and then receives his wages.

Serjeant *Darnell* argued, That this was no settlement; for the court must take the fact as stated by the justices: and therefore tho' the circumstances set forth in the order, might have been sufficient to have induced the justices, to have found this a fraud, and that the real hiring was for a whole year; yet since they have expressly stated the fact otherwise, and that he was hired three or four days after *Michaelmas*, until *Michaelmas* next, the court must take the fact for granted; and then there can be no settlement, because no hiring for a year, as the law requires. Hiring for less than a year, tho' it be but for three or four days less, no settlement; notwithstanding actual service for a whole year.

Adjournatur. But afterwards (*ut audiui*) held no settlement.

Joselyn

Easter Term I Geo. I.

* P. 294.

* Josselyn and Lacier: B. R.

See post 316.

Fort. 281.

Assumpsit.

Declaration as
upon a bill of
exchange.

THIS was a writ of error, upon a judgment given in the court of C. B. in an action of *assumpsit*, where the plaintiff declared, that *Evans* drew a bill upon *Josselyn*, requiring him to pay *Lacier* seven pounds every month, (the first payment to begin in *December*, about two months after the date of the note) *ex renovan. subsisten.* of *Evans*, and place it to his account; That *Lacier* carried the note to *Josselyn*, who accepted it, and promis'd to pay it, *secundum tenorem billæ*; by which acceptant, according to the custom of merchants, he became liable; that afterwards he refused to pay, &c.

Defendant pleads *non assumpsit infra sex annos*; judgment *pro quer.* upon which judgment the present writ of error is brought.

For the plain-
tiff in error.

Where the
plea must not
be non as-
sumpsit infra
sex annos, but
causa actionis
non accrevit
infra sex annos.

Serjeant *Brantbwayt*, who was of counsel for the plaintiff in error, owned that the defendant's plea was naught; for the promise being to do an act upon a future day, the plea should not have been *non assumpsit*, &c. but that *causa actionis non accrevit infra sex annos*. But he insisted, That the declaration was vicious; for the plaintiff declared upon the custom of merchants, concerning bills of exchange; and yet sets forth such a bill, as in the very nature of it appears not to have been a bill of exchange.

Ant. 104. Salk. 422.

A naked pro-
mise no suf-
ficient found-
ation for an
action.

* P. 295.

Ex nudo pac-
to non oritur
actio.

Salk. 129.

Whether the
consideration

It is essential to a bill of exchange to be negotiable, which this cannot possibly be; because it is to pay upon a contingency, *ex renovan. subsisten.* of *Evans*.

If it should be objected, that there is set forth in the declaration, an express promise to pay: it may be answered, that this will not help the matter; because a * naked promise, a *nudum pactum* is not in law, a sufficient foundation for an action.

There must be a consideration; and the consideration must be particularly set forth in the declaration, that so the court may judge whether it be sufficient to maintain an action.

Whether the consideration of the promise ought to be particularly set forth?

Cro. Car. 31. Plaintiff declares, that the defendant being indebted promised to pay; held that the consideration was not sufficiently set forth, for that the plaintiff ought to have specified the cause of the debt; as money lent, goods sold or delivered, &c.

1 *Siderfin* 45. *Paululum tempus* he should forbear, held not a good consideration; because no certain judgment can be made, what portion of time that is. Consideration of forbearance for a convenient time,

Easter Term 1 Geo. I.

time, will be good ; but then there must be an averment how much time he did stay.

2 *Levinz* 152, In *assumpsit per executor*, plaintiff declares, that the defendant, being indebted 20 l. to the testator, according to an agreement between them made, promised to pay : After verdict for plaintiff, upon *non assumpsit*, judgment was arrested ; for want of setting forth this agreement.

4 *Mod.* 244. Strongly insisted upon, as a case in point, to prove, 1st, That this was not a bill of exchange. And 2dly, That a declaration upon this, as a bill of exchange, was erroneous.

Mr. Reeves, in affirmance of the judgment, argued, 1st, That this was a good bill of exchange ; for the words *ex renovan. subsisten.* do either import some interest or effects, that the acceptor had of the drawer, in his hands ; or they are idle and insensible. If the former then the case is in effect this, *A.* draws a bill upon *B.* requiring him to pay *C.* so much money, out of the money that is in his hands : *Non refert* whether *B.* has any money of *A.* actually in his hands ; for by his * acceptance, he is estopped from saying the contrary. But * P. 296. if the words are insensible, then they are surplusage.

2dly, He argued, That supposing this not to be a good bill of exchange, there was an express promise laid, and a sufficient consideration to support it.

Labour and trouble, &c. as sufficient a consideration to support an *assumpsit*, as a valuable one ; for almost any consideration, tho' ever so small, has been held sufficient to support this sort of action. 3 *Cro.* 77. 1 *Sid.* 369. 1 *Vent.* 71, 74.

He insisted, That the drawing the bill was a request and authority to demand the money ; and that the trouble the plaintiff was at in demanding the money, was a good consideration.

To which *responsum per serjeant Brantwats*, That the going of Reply. the plaintiff to demand the Money, was no part of the contract, nor any advantage to the party that made the promise.

Adjournatur. See the last case in this term.

Queen and Blagden. B. R. See Ant. 211.

MR. Reeves for the defendant. He observed, That if the crown had a right to join issue upon the traverse, yet the issue was here ill joined ; because not joined in the words of the traverse, but more narrow and restrictive.

The information charges the defendant, with using the office, liberties and privileges, franchises, &c. of port-reve of the town of

Easter Term 1 Geo. I.

Honiton, and the traverse is taken in words as general and comprehensive as the charge; but the issue taken upon the traverse is *absque hoc* that he usurped the office generally. Now a man may usurp the office, and not usurp all the privileges, &c. relating to that office.

* P. 297.

Pleading.

Whether the crown may take issue upon the traverse?

* As to the main question, which was, whether the crown was at liberty to take issue upon the traverse, or not; the only precedent, alledged in behalf of the power of the crown, was that of the *Queen and Walcourt*, Term. Hill. 23 *Eliz. Rot. primo*; and there the question never received any judicial determination, because the defendant died.

As to the case of *Sir Gervas Clifton*, 3 *Leon.* 184; he said, That it appeared from a larger report of that case in *Godbolt* 91, that it was *nihil ad rem*.

Co. Entries 539, 540. in the writ of seisin, where the other *entries* are set forth, the traverse is omitted, which proves it immaterial.

Of the difference between informations of intrusion, and those in the nature of a quo warranto.

To the objection, That in an information of intrusion, King may take issue upon the usurpation, tho' a title be set forth; he answered, That an information of intrusion was of a different nature from this; because *non sequitur*, from his having a title, that he is no intruder; but it does, that he is no usurper.

The course of precedents is so in intrusion; but otherwise in this kind of information; which a presumptive argument that there is a difference.

Another difference there is, That in an information of intrusion, the crown sets forth its title, and concludes *de præmissis*, &c.

Maxim in law.

Then he argued, That the allowing the crown to join issue upon this traverse, in their replication, would be inconvenient to the crown, inconvenient to the party, inconvenient to the court; and *argumentum ab inconvenienti fortissimum in lege*.

* P. 298.

In the first place, it is inconvenient to the crown: because by this the matter is put at large; the defendant may give any thing in evidence; and it amounts in effect, to the general issue of *non usurpavit*. *Co. Ent.* * 372, *Heydon's Case*. All the inconveniencies of allowing general issues will follow upon allowing this.

If the king can take issue upon this, he is bound to do it. Where the defendant sets forth his title with traverse, and the king's title is upon record, *there* the king may either traverse the defendant's title, or he may waive that, and take issue upon the defendant's traverse; but if his title do not appear upon record, then the king is bound to take issue upon the defendant's traverse. *Bro. Prerog.* 116. *Vaughan* 64.

As to the objection, That no prerogative of the crown is here insisted upon, but only a right common to every subject; it is enough to answer, that the Attorney General would not be content in this case,

Easter Term 1 Geo. I.

case, to be bound down by the same rules of pleading that the subject is; the subject could not have avoided taking the issue, but no one will say the crown was bound to do this.

2dly, This would be inconvenient to the party: Because it renders it almost impossible for him to prepare for his defence; for the crown may upon this issue attack his title, or may give in evidence a misfeisar or forfeiture of his office.

3dly, This would be inconvenient to the court. For the court cannot tell what judgment to give, without being certified from the judge that tried the cause, what the nature of the evidence was; for the using an office without a title, and the forfeiting an office by misusing, require different judgments.

In the last place, he insisted, That the defendant by setting forth his title, had answered the whole charge of the information, which was for him to shew *quo warranto*, &c.

Court all of opinion, That the defendant should have judgment.

Parker, chief justice. No body ever thought that *non usurpavit* was a good plea; and the reason why it * is not, evidently appears * P. 299. from the nature of the charge, which is for him to shew, by what warrant or authority, &c. to which that plea is no answer. And if this could not have been pleaded in bar, then most certainly that replication, which does in effect set up that plea again, must be naught.

If *non usurpavit* were a general issue, allowed in this case, all the rest of the pleadings would be to no other purpose but lengthning the record. Hob. 127.

The difference observed by Mr. Reeves between the case before us, and an information for intrusion, is very just; for tho' the defendant should have a title, yet it is very possible he may be an intruder, but impossible that he should be an usurper.

Powys, judge. Of the same opinion. The very reason of joining issues, is that the party may come prepared to defend one single point. In case of barrettry the law is otherwise; but then it must be told what point will be gone upon.

Pratt, judge. I am of the same opinion. For had *non usurpavit* been a good plea, every body would certainly have pleaded it; because by this means the Attorney General would be kept in the dark, and unacquainted with the nature of the defendant's title; and the hazard of setting forth a special title, where the greatest certainty in pleading is required, might be wholly avoided.

Besides, the labour of pleading specially is entirely lost, if all may be set aside by a general replication.

Judgment *pro def.*

Easter Term 1 Geo. 4.

* P. 300. * *Muston and Yateman*. B. R. See Ant. 228.

THE court was moved for the plaintiff, by Mr. *Fortescue* in arrest of judgment.

Pleading.

Two points considerable. 1st, Whether the defendant's plea was not naught? Because it says only, That Sir *Thomas Freke* was seised generally; but does not say, that he was seised *in dominico suo ut de feodo*, which estate only can support a prescription.

2^{dly}, Whether, supposing the plea to be naught for this reason, the finding of the jury had not cured this defect?

Of defects in pleading being aided by verdicts.

The 1st point he waived, as sufficiently spoken to formerly; and argued 2^{dly}, That this defect in the plea was not aided by the verdict, because the seisin was no part of the issue; but previous to the usage, and admitted by the replication, whereby the usage only was put in issue.

The general reason, why defects in pleading are cured by verdicts, is, because it is to be supposed, That the verdict could not have been found, unless there had been evidence given at the trial of that matter wherein the pleading is defective, 1 *Mod.* 161. But this not being part of the issue, can never be supposed to be given in evidence. Nay this is not only no part of the issue; but it is not even a necessary consequence of the issue; for there might be such a usage, and yet the party not seised in fee. Had the jury found a title, that he was seised in fee, it had been erroneous; or at least it had been a void finding. 1 *Sid.* 96.

* P. 301.

The only case, where a bad prescription is held cured by a verdict, is 1 *Cro.* 445. and that case is easily answered; for 1st, How was it possible, that any finding of the jury could maintain that prescription, which * the law says is naught? And yet that is the case there; for there the prescription was, That the defendant and all the occupiers of the said close, time out of mind, &c. This prescription was by the court held too general; for tenant at will, or disseisor may be occupiers.

2^{dly}, This case denied to be law, *Mich. 9. Anna, Thorn and Rookby*.

To the case of *Hutton* 54, quoted when the case was spoken to before, he answered, That *there* of necessity the verdict must help; because a grant of a thing being alledged, which in its own nature could not be granted but by deed; unless the jury had found the deed, they could have found no grant at all.

Easter Term 1 Geo. I.

Then he quoted several cases, wherein it was held, That bad and defective pleadings are not aided by verdicts. *Hob.* 189. Action upon *Hob.* 286. the case. 2. *Cro.* 245. *Assumpsit.* 3 *Cro.* 419, Case. 3 *Cro.* 515. Debt upon obligation. *Style* 220. *Assumpsit.*

Serjeant *Salkeld* argued for the defendant, and insisted, That after a verdict, this must be intended a seisin in fee. In 1 *Ventris* 122. it is said by the chief justice, that after a verdict, the court would make any intendment to make the case good.

1 *Siderfin* 218. proves that a court will strain very hard to support a verdict.

The question therefore is, Whether seisin can possibly be intended of a seisin in fee? And without doubt it may; for seisin is the genus, seisin in fee, in tail, for life, &c. are the species.

The word *seised* does rather import seisin in fee than any other estate; because seisin in fee is the mother estate, and all the other particular estates begin by contract.

In the pleading of a fine, it is *seisimus* only; and yet always understood to be *de feodo*.

Could not the plaintiff have replied, That *Freke* was seised for life, and have traversed the seisin in fee * *modo & forma*, as by the plea was supposed? Certainly he might; for whatever is necessarily supposed in a plea, may as well be traversed as what is expressed. *Pasch.* 3. *Ann.* *Gilbert* and *Parker*.

If this had been traversed, then no question this had been in issue. Evidence likewise might have been given by the plaintiff to shew, that *Freke* was seised for life, and not in fee; and this had made an end of the issue.

He likewise took a difference between a defective title in itself, and a title defectively set forth; the former cannot be supported by a verdict, but the latter may. For this purpose he cited, *Pasch.* 9 *W.* 3. *Dorne* and *Cashford*. *Hill.* 4 *Anna.* *Crouther* and *Oldfeild*. *Hobart* 116, 117. *Palmer* 420. Same case *Latch* 130.

From the verdict found by the jury, it is plain that it must be such a seisin, as that those whose estates Sir *Thomas Freke* had, did time out of mind use such a way, &c. Now this could not be any other seisin but in fee; therefore the verdict has helped the plea.

Parker, chief justice. As clear as the sun, that unless evidence had been given to the jury, of Sir *Thomas Freke*'s having an estate in fee, they could not have found such a verdict; and then according to the rule laid down by Mr. *Fortescue*, the verdict has helped the pleading.

Seisin in fee, as was supposed in the plea, might have been traversed.

Powys, judge, concurred with *Parker*. *Eyre* doubted.

Easter Term I Geo. II

Pratt, judge, concurred so strongly with *Parker* that he held the plea would have been good, even upon a general demurrer. The word *seisius*, *ex vi Terminis*, no more imports *seisin* for life, than *seisin* in fee. It is true that *seisius* alone, shall be intended a *seisin* for life; but the reason is, because it is a maxim of law, that *contra proferentem fortius accipienda sunt*; and a *seisin* for life is the most prejudicial *seisin* to him that pleads it. Therefore if any averment follows in the same plea, that does necessarily restrain the *seisin* to a *seisin* in fee, upon a general demurrer it is well. And this is the case here; for the subsequent averment, that he and all those whose estate he had, must be false, unless it were a *seisin* in fee. And if this be necessarily included in the verdict, as undoubtedly it is, then it is aided by it. The authorities are innumerable.

Ant. 229.
Hob. 242.
* P. 303.
Maxim of law.

3 Salk. 279.

Adjournatur.

Weddall and Manucaptors of Jocar. B. R. See Ant. 267.

IN answer to the objection against the plea, that had been made when the case was spoken to last, Mr. Serjeant *Salkeld*, who was of counsel for the bail, insisted copiously upon a difference between pleas of performance, and pleas by way of excuse. Had this been pleaded by way of performance, he owned it would have been naught; whereas he contended it was by way of excuse, and therefore well.

Of the difference between pleas of performance, and pleas in excuse. Salk. 500.

The only matters that can be pleaded as a performance, to this recognizance, are either rendering the body, or paying the condemnation; but this none of those; *ergo* a plea in excuse.

Had it been a plea of performance, it had been naught; because the issue joined upon it would then, according to the objection, have been material only one way.

A plea in excuse, in the very nature of it, implies a non-performance; and it is always decisive and effectual; because the court will intend nothing in favour of him that pleaded it, but what is contained in the very plea: and therefore the bail having pleaded here, that the principal died *ante emanationem brevis*, by way of

* P. 304. excuse, the court shall never intend the death of the principal, between the emanation and the return of the writ; so that if at a trial upon this issue there had been evidence, that the principal was alive at the time of the emanation of the writ, judgment must have been given for the plaintiff; nor would any evidence have been received of his death, between the emanation and return. As for the cases of debt upon bond, and *solvit ante diem* pleaded; not parallel, because pleaded as performance. *Cro. Jac.* 434. *Robinson's Entries* 196. *Telv.* 192. 7 *Co. Rep.* *Pinnell's case*, 2 *Rolle's Rep.* 187. There

Easter Term Geo. I.

There is no doubt but accord with satisfaction, tho' before the day, may be pleaded in bar of debt upon bond; and yet the objection will hold equally here, viz. That it is possible, that tho' this plea should be found against the defendant, yet he might pay the money according to the condition of the bond at the day; and therefore the issue joined upon this plea, material only one way. No, this is a plea by way of excuse, which supposes non-performance.

Pleading is only setting forth that fact which in law is a good discharge; if therefore the death of the principal *ante emanationem brevis*, be such a fact, as in law does discharge the bail, certainly the bail may plead it.

Mr. Fortescue *contra*. What is a good discharge may no doubt be pleaded; but then it must be pleaded properly and in due form.

The proper way of pleading it had been, that the principal died before the return of the *Ca. Sa.* So is *Thompson's Entries* 280, and all the precedents.

The end and design of joining issues, is to be final, and conclusive to determine the matter one way or other.

No issue can be joined on this plea, that can be material both ways; and it is parallel with the cases of *Hill and Manby*, *Atwood and Coleman*, *Merril and Josselyn*, where *soluit ante diem* pleaded, and held that the other party had no remedy, but by demurring to the plea.

* As to the 2d point, namely, the objection taken by the counsel for the defendants to the *scire facias*, viz. That the *scire facias* was brought not only for the costs and damages given against the principal in the original action, but likewise for the 9 l. additional costs adjudged upon the writ of error; whereas it appeared upon oyer of the recognizance, that the bail was only bound to pay, what was given against the principal in the original action.

Mr. Fortescue answered, 1st, That the word *prædict* should refer only to the 105 l. and not both to the 105 l. and the 9 l. too.

2dly, That the conclusion *secundum formam & effectum recogn. prædict* did necessarily tie down the word *prædict* to such damages and costs only, as could be recovered by that recognizance.

3dly, That this fault might be cured by entering of a *nolle prosequi* as to the 9 l. and taking out execution only for the 105 l.

A *scire facias* is in nature of an action of debt; and therefore to be governed by the same reason.

If I demand too much, I may release it; and this release is no falsifying the writ. One may release an ill demand, as well as a good one. *Hobart* 133. *Mich. 1 Anne, Inledon and Crips*. *Styles* 175. *Salk.* 658. *Thebau. Brevium.* 234.

To this last point serjeant *Salkeld* replied, That he never before heard of *nolle prosequi's* being entered upon writs; that he had

Easter Term II Geo. I.

heard of abridging counts, but never of abridging writs; that this was not only a writ, but a judicial writ, which is the act of the court, and must have a foundation on which it is warranted.

Court.

1st point.

Of the bail's plea to the scire facias.

* P. 306.

2d point.

Whether the scire facias be faulty.

Scire facias a judicial writ.

Of pleas in excuse.

A different sum pleaded to be paid in satisfaction of a bond, from what is found to have been really paid, varies the record. But it is otherwise where there is a difference in time only.

Parker, chief justice. There is no doubt, a difference between pleas of performance, and pleas of excuse, in many respects. But the question here is, Whether you can make that time which is immaterial, part of the issue.

* It seems to be a general rule of reason as well as law, that circumstances ought never to be put in issue, any further than they touch the matter in question; and whatever issue does otherwise is immaterial.

As to the other point, the word *predict* must refer to the *q. l.* as well as the *10 s. l.* because there is no other end or purpose, whatsoever, than the *q. l.* is mentioned, but only that the *predict* may relate to it.

The words *de placito predict* must relate to both pleas, or else it is uncertain to which.

A *scire facias* a judicial writ, founded upon record; and therefore if a writ issues out, not warranted by the record, it must be quashed.

Pratt, judge. I did upon the first argument, think the plea naught; now am somewhat doubtful.

There is no doubt but the defendant might have pleaded, That the principal died before the return of the *copias*; but since he has pleaded more to his disadvantage, I doubt he must prove his excuse, in the same way that he has pleaded it.

Tho' this or that particular day is immaterial, yet time is material; and the pleading of the death of the principal generally, without confining it to some time, would not have been good. Since therefore it was necessary for him to confine it to some time, and he has confined it to this time, tho' this be a narrower portion of time, than what he was obliged to, yet since it is his own excuse, he must stand and fall by it; and the court will not intend a fact in his favour, which he neglected to plead.

Suppose a bond of 100 *l.* conditioned for the payment of 50 *l.* the defendant pleads 20 *l.* paid in satisfaction. Upon the trial of the issue, it appears that ten pounds were received in satisfaction, the verdict must go against the defendant; and yet the sum of ten pounds,

* P. 307. received in satisfaction, is as good a discharge * in law, as the sum of 20 *l.* but being a plea in excuse, he is bound to prove it, as he pleaded it.

Parker, chief justice. The difference in the sum varies the record, but so does not a variation of time.

Easter Term 1 Geo. II

Suppose a bond, conditioned for the payment of money before such a day; the defendant pleads that he paid the money such a day, according to the condition of the bond. Suppose upon evidence the fact comes out thus, That the money was paid after the day he pleaded payment upon, but before the day mentioned in the condition of the bond; and this is found specially, what is to be done?

But it is otherwise where there is a difference in time only.

If it be once laid down as a principle, That whatever is pleaded by way of excuse, is necessary to be proved, and part of the issue, then my brother Pratt is right.

Pratt judge: (Opinion as to the 2d point) If a person has judgment to recover two distinct sums, and being sensible that he has a right only to one, he releases the other, and takes out execution for the one only, can this judgment be reversed? and yet the judgment is the act of the court?

2d point. Judgment for two distinct sums; execution may be taken out for one only, and the other released.

But here the *scire facias*, tho' it be the act of the court, yet it is not purely the act of the court, but grounded upon the prayer of the party.

Mr. Fortescue has cited no precedents; but I see nothing in the nature or reason of the thing, why a *nolle prosequi* may not be entered as to the 9th.

King and Gully. B. R.

ORDER of sessions quashed; ordering the father to pay so much per week towards the maintenance of his daughter; because it was not set forth in the order, that she was unable to work, without which the justices have no jurisdiction.

Set. Rem. 70. Order for father to pay so much a week for the maintenance of his daughter, quashed; because not said, that she was unable to work.

* By unable to work, the act means a person, not able by work to get his own living; and not a person that is able to get nothing at all.

* P. 308. What the statute means by a person unable to work.

There was another exception to the order; and that was, that this allowance was to be paid until further order; whereas it should have been, as long as the father continued able to allow, and the daughter poor and unable to work.

Ant. 85.

But this exception was over-ruled.

Salk. 534.

The King v. Bishop of Meath & al.

THIS was a writ of error, upon a judgment in a *quare impedit*, out of Ireland.

There were two exceptions taken to the writ of error, by the counsel for the defendant in error.

Easter Term I Geo. I.

1st Excep-
tion to the
writ of error.

The 1st was, That the return to the writ of error, was by *Richard Cox Mil.* and not *capital' justic'*.

Answer.

Of returns
to writs of
error.

In answer to this, Mr. serjeant *Salkeld* quoted several *Entries. Co. En.* 225. 228. 231. 234. 244. *Pla.* 6. 248. *Pla.* 8. 249. *Pla.* 9. 252. *Pla.* 10. 257. in some of which no *respons'* at all; but only *record' & process. de quibus, &c. sequuntur in hoc verba*; in some the name of the judge *infra nominat'*, and no more; and produced in court, several precedents of returns to writs of errors, out of *Ireland*, in the very same manner, as in the principal case.

Then he urged, that whenever any record came into court, the time for debating whether the record was returned by a proper officer, was the first term; for if it remains a term undisputed, it must be taken for granted, that it was returned by a proper officer.

No officer, but a sheriff, and that by the statute of *York*, obliged to set his name to the return.

* P. 309.

* The returning of a record, by a judge of an inferior court, to a superior court, not a judicial act, but a ministerial one.

2^d Excep-
tion to the
writ of error.
No such writ
in law as a
quare impe-
dit.

Another exception was taken to the writ of error, That the writ of error was *Quid cum, &c. per breve nostrum de quare impedit*; where- as the words of the writ are, *quod permittat ipsum presentare, &c.* and there is no such writ as *quare impedit*.

Answer.

To this it was answered by serjeant *Salkeld*, that *Bracton* 246, 247. distinguishes between the writs of *quod permittat* and *quare impedit*.

That *quod permittat* was either an antiquated writ, or taken away by some old statute now lost. Statute 13 *Edw. 1. cap. 5.* and *Maynard Edw. 2. fol. 300. Mich. 10 Edw. 2.* cited to prove, there never was such a writ as *quod permittat*.

In all judicial records it is called a *quare impedit*, item in writs of inquiry, item in writs to the bishop *de Cler. Admittend'*. *Rastall's Entries* 502. *Pl.* 1. 2. 4. 5. 8. 10. *Rastall's Entries* 507.

The book called *Officina Brevium* 9. and *Thesaur. Brevium* 1. call it a *quare impedit*; and so do many statutes. If now in statutes, and in judicial records it is known by the name of *quare impedit*, why may it not in writs of error?

Then the serjeant went on to take exceptions to the original record.

Hob 163.

Tho' in a *quare impedit*, both plaintiff and defendant may be actors, that must be understood, when both are out of possession; for when the defendant is in possession, plaintiff cannot recover unless he make a title, and the defendant is not obliged either to make a title or become actor.

In

Easter Term 1 Geo. I.

In a *quare impedit* the plaintiff must set forth both seisin and vacancy; but here he has failed in both.

* 1st, As to seisin, the declaration stands thus, *seisitus fuit & inad-vocatione ecclesie*; here the *et* couples nothing, and *seisitus* refers to nothing.

2^{dly}, Vacancy; record thus, *ecclesia præd vacavit per cessionem*, &c. Now this is pleading a consequence, without setting forth the act, of which this is a consequence; it ought to have been pleaded thus, That the parson was made a bishop, or advanced to a living incompatible, &c. as the fact was, *per quod ecclesia præd vacavit*.

3^d Exception taken to the record was, That the conclusion was, *et hoc paratus est verificare*, instead of *inde producit sectam*, and so no suit before the court. This not meer matter of form.

4th Exception, That the *venire* was returnable upon a day certain; whereas in a *quare impedit* it ought to have been returnable, upon one of the common return days. Noy 120. This therefore a discontinuance; and not helped by the statute of Jeofails, because the king is party. *Tutchin's case*.

Mr. Denton contra.

To the objection about seisin, the word *et* may be left out, or transposed thus, *et de feodo et de jure*.

The objections concerning the vacancy, and the *paratus verificare*, admit of this answer, that advantage might possibly have been taken of them by demurrer, which advantage lost by taking issue.

As to the *venire*; it was answered, That there are two *venire's*, and to the 1st there is an entry of *vice-comes non misit breve*, and the 2^d is returnable upon a common return day.

Court: The objection of the seisin the strongest; for it is nonsense at present, and every thing may be cured by leaving out and putting in. Possibly in transcribing, the record *de* was omitted; and if the fact be so, it may be set right by a *certiorari*. *De et in* *advocatione* would be well.

As to the omission of the *inde producit sectam*, This would have excused the defendant in not answering; but in fact he has answered it.

As to the calling of the writ *quare impedit*, instead of *quod permittat*: The fact is, that there was formerly a writ of *quare impedit*, now out of use; and the writ *quod permittat*, is now erroneously called by the name of *quare impedit*. This error has prevailed in judicial writs, and acts of parliament; but never yet in writs of error. However it being become now a legal name, the writ of error ought not to be disallowed for using of it.

As to the objection, to the return of the writ of error; it seems to be wrong. *Capital justic'* without his name, or *Richard Cox infra nominat'*

* P. 310.

Exceptions taken by the plaintiff in error, to the original record.

Salk. 51.

Answer to the exceptions.

* P. 311.

The old writ of *quare impedit* is now out of use; and what is called by that name, is the writ of *quod permittat*.

Easter Term 1 Geo. I.

nomina had been well: however since several writs of error from Ireland have been returned in the very same manner, this ought to be allowed.

As to the objection about pleading the vacancy: it ought to have been pleaded as brother *Salkeld* would have had it; but the vacancy is admitted, by their pleading a presentment under it.

Adjournatur.

Stafford and Forcer Administrators of William Moore.

B. R.

Assumpsit.
Motion in
arrest of
judgment.
Stat of limi-
tations.

* P. 312.

Verdict will
not help,
where upon
face of the
declaration it
appears, that
it is impos-
sible to be
supported by
any evidence
whatsoever.

THIS was an action upon the case, upon several promises. As to the 2d promise, the plaintiff declared in this manner; That *William Moore* the intestate, gave a note to him the plaintiff, bearing date the 1st of *December 1704*, and reciting that whereas *Stafford* had at the special instance of the intestate, lent to * *Augustin Moore*, brother of the intestate, the sum of 100 l. and whereas the said *Augustin Moore* had given his bond for the repayment of the same, upon the 2d of *June* following with interest; and for further security had given a warrant of attorney to confess judgment upon the said bond; the said intestate promised, if the said *Augustin Moore* did not repay the same with interest, upon the 2d of *June* following, pursuant to the condition of the bond, that then he would pay the same with interest. *Ayers, &c.*

To this defendant pleads, *causa actionis non accrevit, &c.* Verdict for the plaintiff.

Moved in arrest of judgment, that notwithstanding the jury had found for the plaintiff, he could not have judgment; because it appears upon the face of the declaration, that the cause of action did accrue above six years before the death of the intestate; for the cause of action accrued from the 2d of *June* following the 1st of *September 1704*.

Interest of
money.

Another objection was taken, that here bringing of the action for the interest, as well as the principal, vitiates the whole, 2 *Rolle's Rep.* 47. a.

Parker, chief justice: As to the interest, we are upon an express promise; and an express promise to pay interest, or money won at play, will support an action.

In answer to the grand objection, it was urged, that the court should take notice of the common practice of not putting bonds in suit, while the interest was duly paid; that this was the case here, that the obligor did for some time duly pay the interest; and this moved

Easter Term I Geo. I.

moved the jury to find as they did, for it was contended that the cause of action did not arise until the obligor made default in payment of interest.

* It was urged that the note was only the form of the promise, and evidence of it; and therefore if a promise made without a note, be capable of continuance, a promise by note must be so too. * P. 313.

1 *Ventris* 191. held, altho' it did appear by the declaration, that the cause of action did arise above six years, &c. That yet the defendant should not take advantage of it, without pleading it.

Raym. 86. Plaintiff declares as executor, upon a promise thirteen years ago; *non assumpsit infra sex annos* pleaded. Replication, *assumpsit*, &c. issue joined. Verdict and judgment *pro quer.* for though the replication was a departure from the declaration, defendant should have demurred to the replication, instead of joining issue. Ant. 251, af- 252.

Here the declaration aided by a verdict.

Court: There is a difference between declarations upon a parol promise, and a promise by note; in the former the day is not material, in the latter it is. Difference between parol promise, and promise by note.

The issue here is upon a promise by this very note; and therefore impossible in the nature of the thing, that an evidence of a subsequent promise, or a subsequent note, can prove a promise by this note.

As to the common practice of not putting a bond in suit, until the interest, &c. The answer is, that default of paying the interest, would never give a cause of action, unless there were one before. According to this note, upon the nonpayment upon the 2d of June, *causa actionis accrevit.* A verdict will cure any thing that a verdict can cure; but not where upon the declaration it manifestly appears, that no evidence whatever can maintain the issue.

Formerly it was held, that the parties should not take advantage of the statute of limitations without pleading it. But now the law is otherwise.

Case of *Dean and Crane* was to this purpose: there was a promise to the executor within a year before the action brought; but the issue joined was, whether the * promise was made to the testator within six years before the action brought; verdict for the plaintiff. Salk. 28. * P. 314.

Moved in arrest of judgment that it appeared upon the face of the declaration, that the testator was dead, above six years before the bringing the action; and therefore, &c. Lord chief justice *Holt* was of opinion at first, that the verdict had cured it; but afterwards it was resolved by the opinion of all the judges, that this was a defect impossible for a verdict to cure.

In the case of *Heylin and Huskins* 10 *Ann.* there was a question, Salk. 29. Whether a bare acknowledgment of a debt amounted to a new promise? and resolved that it did not. But in that case there was an express promise, upon which the plaintiff declared, *viz. I deny that I owe you any thing; prove it, and I will pay you.*

Judgment in principal case was arrested.

Easter Term 1 Geo. I.

Champney and Champney. In Canc.

Portions.
Marriage settlement.
Construction of it.

IN a marriage settlement, a power was lodged in trustees to raise 3000 *l.* for a daughter, to be paid her, at the age of 21, or day of marriage, which should first happen, when *Champney* and his wife should die without issue male; and in the mean time an hundred pounds *per annum* to be paid her for her maintenance.

Resolved *per* Lord Chancellor *Cowper*, upon the authority of the Duke of *Southampton's* case; that the words *when Champney and his wife should die without issue male*, amounted to a condition precedent; and that the time of raising the portion, did not commence, when one of them should be dead without issue male, and so the other be tenant in tail, *après possibilité d'issue extinct*; but when both of them should be dead without issue male.

* P. 315.

* Resolved, That the *mean time* in which the hundred pounds *per annum* was payable for a maintenance, must necessarily relate to the intermediate time between the raising the money and her attaining the age of twenty-one, or day of marriage.

Temple and Welds. B. R.

Assumpsit.

AN action of *indebitatus assumpsit*, for money received *per* the defendant, to the plaintiff's use.

Upon evidence the case came out thus: the plaintiff and another laid a wager; the defendant held stakes; the plaintiff brought evidence, that he had won the wager. *Blencowe* that tried the cause, being of opinion, that the plaintiff had mistaken his action; because this money could not, at the time of the action brought, be said to be money received to the plaintiff's use, since the defendant was not to pay the money, until the wager was *proved* to be won; the plaintiff was nonsuit.

The plaintiff now moved to set aside his own nonsuit; because occasioned by the judge's mistaking the law.

Court: Action well brought; for upon the wager won, the money was actually the plaintiff's, tho' he could not receive it before the fact was made appear.

Sed adjournatur.

Betts, Executor of — versus Mitchell.

Executor.
Action brought as executor

ACTION upon the case, for several promises made by the defendant to the testator.

As

Easter Term 1 Geo. 1.

As to the 5th promise; plaintiff declares, that the defendant the 13th of August 1713. made a promissory note to him *ut executori* of such a one, payable to the * plaintiff or order; and then the plaintiff concludes, that the defendant not minding his promise did not pay, &c. To this declaration the defendant demurs. should have been brought in his own right. * P. 316.

Insisted upon, that this 5th promise was of such a nature, as could not be joined with other promises made to the testator. For tho' the note is made to him as executor, *that* is only a description of his person. The note is payable to the plaintiff or order; and by virtue of the statute, concerning promissory notes, it is transferrable by indorsement; and the indorsee might maintain an action,

This as much a new contract, as if a bond had been given to the plaintiff for this money.

Defendant cannot plead to this note *plene administravit*; but must plead *non assumpsit*.

Plaintiff might have brought an action upon this note, without naming himself executor.

This note will go to the administrator of the executor, and not to the administrator *de bonis non*, &c.

Court clearly of this opinion. Judgment *pro def. nisi*.

Josselyn and l'Acier. B. R. Ant. 294.

PARKER chief justice delivered the opinion of the court.

In this case, two points considerable, 1st, Whether this be a good bill of exchange? We are all of opinion, it is not a bill within the custom of merchants; it concerns neither trade nor credit; it is to be paid out of the growing subsistence of the drawer; if the party die, or his subsistence be taken away, it is not to be paid. Resolved to be no bill of exchange.

* It may be never paid, and yet his credit unimpeached; not payable * P. 317. to order, nor for value received.

It does not appear whether the party, that is to receive it, is to receive it upon account of a former debt, or is to receive a bounty.

As to the 2d point, *viz.* Whether if the bill by custom of merchants, is not a good bill of exchange, it may not be supported by the promise? All of us are of opinion, that it cannot.

For as to that matter it stands thus, *Quorum præmissorum ratione*, &c. and *in consideration inde* he promised to pay, &c. The word *inde* plainly refers to the bill, as supported by the custom; and consequently if that fails, the consideration must do so too.

Judgment reversed.

Michaelmas

* P. 318. *

Michaelmas Term.

2 Geo. I. B. R.

Dorset and Chaplin.

Writ of error.

Tho' after a verdict, want of an original is, yet an ill original is not aided by statute of Jeofails. Salk. 267.

WRIT of error out of the court of C. B. error assigned, want of an original.

Upon a return to a *certiorari*, directed to the *custos brevium*, it appeared, that the original was a *quare clausum fregit*; an improper original for an action of debt. And tho' after a verdict, the want of an original is aided by the statute of *Jeofails*; yet an ill original is not aided. 5 Co. Rep. 37.

It was answered, That a *quare clausum fregit* is no original in an action of debt; and therefore the case to be considered, as if there was no original at all.

To this it was replied, That the certificate from the proper officer, was the only way of trial, what the original in the action was; and he has certified, that a *quare clausum fregit* was the original; and this certificate the court is bound to give credit to. 2 Cro. 108. *Noy fol. 4. Cro. Car. 272, 281. 1 Brownlow 96. Yelv. 108. 2 Cro. 479.*

* P. 319.

* Court of the same opinion, and would have reversed the judgment, because of an ill original; but Mr. Reeves desiring to speak to it. *Adjournatur.*

Leeds and Carlton. B. R.

Spiritual court.

A Man sues in the spiritual court for a matter, which upon the face of the libel appears to be of temporal consufance, and obtains a sentence. The defendant appeals first, and then sues out a prohibi-

Michaelmas Term 2 Geo. I.

prohibition. In the declaration upon that prohibition, and process Prohibition. thereupon, there is judgment against the defendant, by *nil dicit*; and Damages. writ of inquiry of damages awarded.

It was now debated, whether damages were to be given by the jury upon the writ of inquiry, for the proceedings in the spiritual court, from the beginning of the suit in that court; or only for the process in that court, subsequent to the delivery of the writ of prohibition.

Serjeant *Whitaker* contended, That the plaintiff in prohibition was to have damages in this case, for all the proceedings in the spiritual court, from the beginning of the suit; because the matter appearing upon the face of the libel, to be of temporal, not spiritual conusance, *that* was in point of law, a prohibition to proceed; and their proceeding at all, was both an injury to the party, and a contempt to the crown.

He laboured to maintain this difference, that where the matter was originally of spiritual conusance, and became temporal only *propter defectum triationis*, there damages were to be recovered only for proceedings after a prohibition; but that where the matter was originally of temporal conusance, there the law was itself a prohibition; and to this purpose he quoted 2 *Inst.* 299. *Fitzherbert Abr. Pla.* 15. *Tit. Prohibition.* 9 *H. 6.* 56. *Cro. Car.* 559. *W. Jones* 447.

* *Contra* Serjeant *Darnell*.

* P. 320.

This is a declaration upon a prohibition, in the common form; the chief thing complained of, is proceeding in contempt of the prohibition delivered.

The jury upon the writ of inquiry are to inquire *de præmissis*, viz. the thing complained of in the declaration, which is the contempt of the prohibition. Were the law as serjeant *Whitaker* would have it, the plaintiff should have declared in another manner. Possibly in a declaration upon a prohibition setting forth, Whereas all causes, unless testamentary or matrimonial, are of temporal conusance, &c. that yet, &c. as in *Rastall's Entries* 485. the law may be with them; and yet in those very cases, issue often joined upon this very point, viz. proceeding after prohibition delivered, &c.

For the sheriff to take upon him to judge what things are of spiritual, and what of temporal conusance, would be a thing of a dangerous nature; and yet this must be the consequence, if, &c.

Parker chief justice of opinion, that damages were to be given, only for the proceedings in the spiritual court, since the prohibition delivered.

This is a special action for proceeding in contempt of the prohibition; this the very gist of the action; upon this issue is constantly joined, which, according to what is now contended for, must be an immaterial issue; for if the issue be found with the defendant, that he

Michaelmas Term 2 Geo. I.

has not proceeded after the prohibition delivered, yet if he had proceeded at all, the plaintiff must have judgment for his damages. Nay according to this doctrine, the very pleading this plea, in this sort of actions, is very impertinent; and upon doing which, plaintiff may sign his judgment; for he ought not to plead, That he did not proceed after prohibition, &c. but that he did not proceed at all.

* P. 321. * No action lies against a man for suing in the spiritual court, where he has no right.

Prohibition is to the judge, not to the party; and in this case, this not a prohibition to the first judge, but to the judge upon the appeal.

A further circumstance of the unreasonableness of what is asked for, is, that the party desires to have his damages, for the charge, process and delay, occasioned by his own appeal.

In a prohibition, two things to be considered; 1st, Whether the party is to be punished? 2^{dly}, Whether he is to be estopped?

His not proceeding after the prohibition delivered, prevents his punishment, and excuses him from contempt; but cannot hinder the plaintiff of his judgment.

If upon this issue, whether the defendant did, or did not proceed after prohibition delivered, verdict be found for the defendant, no costs is ever given.

The late statute about giving costs unnecessary, if this doctrine had been true.

And of this opinion was the court. *Sed bastante Pratt judge, adjournatur.*

King and Darrel. B. R.

Treason.

Evidence.

UPON a trial at bar for compassing the death of the king, it was debated, Whether a promise of pardon, did not disable a man from being an evidence?

Resolved by the court, That this was an objection never allowed, and of no weight.

Treason and such like crimes, not to be discovered but by their accomplices, who will never be prevailed with to give evidence, but in expectation of a pardon.

* P. 322. Several acts of parliament have encouraged the discovery of crimes, by the promise of a pardon. As to * the opinion in *Keyling*, of Lord Chief Baron *Hale*, to the contrary; he was over-ruled by the rest of the judges.

Overt act.

Resolved, That a conspiring to levy war, in order to dethrone the king, which is the civil death of the king, is an overt act to prove the compassing the death of the king.

But

Michaelmas Term 2 Geo. I.

But a conspiring to levy war generally, is not an overt act to prove the compassing the death of the king; because there may be such a levying war, as may be treasonable, without any intention of deposing the king; as pulling down inclosures, bawdy-houses, &c.

The opinion in *Keyling*, p. 20. as opposed to Lord *Coke*, held for good law.

* Hilary Term

* P. 323.

2 Geo. 1. B. R.

Baldwin and Church.

W R I T of error out of the court of *C. B.* The original Error. action was an action of debt for 20 *l.* against two ex- Debt. cutors. The one pleads *plene administravit* as to all the Pleading. affets in his hands, *præter* 40 *s.* and concludes *quare actio non*; the other pleads *plene administravit* generally. Plaintiff demurs generally to both pleas. Judgment in the court of *C. B.* for the defendants. Error brought,

Mr. *Yorke* for plaintiff in error.

If a man takes upon him to plead to the whole, and then pleads such a plea, as goes but to part of the action, the plea is bad for the whole.

A plea is in its nature intire, and cannot be good in part, and void or bad for the rest.

The defendant has here pleaded in bar to the action, such matter, as amounts to a confessing the cause of action; and consequently, that the plaintiff should have recovered. The defendant should in this

Cases quoted
arguendo,
Rolle's Abr.
805.
Cro. Car. 167.
7 Ed. 4. fo.
8. 9 Ed. 4.
13. 21 H. 6.
45. b. Dyer
210. Cro.
Eliz. 318.

Hilary Term 2 Geo. 1.

Rolle's Ab.
928. Pla. 5.
Rastal 309. b.
Pla. 9.

* P. 324.

this case have confessed the cause of action, that he had assets unad-
ministrated * to such a value, and was ready to pay, as far as his assets
would enable him.

The plaintiff had good cause of demurrer, if one of the defendants
pleas be ill; and the court of C. B. ought not to have given judg-
ment for the defendants.

Salk. 262.

The same judgment to be given by this court, as the court of com-
mon pleas ought to have given against both defendants; and that
judgment ought to have been against both defendants *de bonis testa-*
toris, and *de bonis propriis* of that executor that pleaded an ill plea, as
to damages and costs.

For each executor has by law an interest in, and power over the
whole estate; and therefore it is, that the plea of each executor, shall
bind the estate of the testator.

Salk. 219.

If it be objected, that the plaintiff has committed a mistake in his
demurring, by using the word *placitum prædictum* in the singular
number; it may be answered, that *placitum est nomen collectivum*,
and to be taken *redendda singula singulis*, according to 1 Saunders 338.

Court: judgment must be reversed; and the same judgment
given here, as should have been in the court of Common Pleas. The
plaintiff must take care to take his judgment rightly.

The plea undoubtedly ill; for it sets forth such matter, as shews
plainly, That the plaintiff has good cause of action; and yet concludes
Quare actio non, which imports that the plaintiff should not have
brought this action at all.

If a man bring an action of debt for 20 l. and the defendant should
plead, that he has paid 40 s. and conclude *Quare actio non*, This
would be bad; and yet here the plaintiff might have brought his
action for the 18 l. only; whereas in the case of an executor, the
creditor must bring the action for the sum, the debt that is really due;
let the assets be never so small.

* P. 325.

* The reason why, tho' the assets be very small, yet judgment must
be for the whole debt, seems to be for the preventing a fresh action,
in case of more assets.

Taylor and Matthews. B. R.

Judgment.
Practice.
Ant. 30.

Continuances.

Salk. 401.

IF pending the consideration of the court plaintiff dies, judgment
may be entered without entering the continuances; and then it
will have relation to the day in bank. *Lateb 92. 1 Leon. 187. Bal-*
ler and Delander; a modern case. A continuance nothing but a
curia advisare vult.

Tho' the time when in fact the judgment was given, must be en-
tered on the roll, that is only in respect to land, that it may not be
bound until the time of the judgment given, and so purchasers over-
reached.

Easter Term 2 Geo. I.

reached. Before this inconvenience was provided against by Stat. Car. 2. there might have been an inconvenience, in entering judgment without continuances; there can be none now.

* Easter Term

* P. 326.

2 Geo. I. B. R.

Herson and Aglionby.

PLAINTIFF brings a writ of error to reverse a common recovery; defendant moved for liberty to plead double.

Motion to plead double.

The motion was opposed, because the act for the amendment of the law, whereby a defendant, by the leave of the court first obtained, may plead double, was not to be understood of a defendant in a writ of error, but a defendant in an original action.

But it was insisted upon, by the counsel of the side with the motion, That this act did extend to the defendant in a writ of error, as well as in an original action. That the one might have as great occasion of pleading double, as the other. That it had lately been resolved; that a writ of error did not abate by the death of one of the plaintiffs; whereas, as the law stood before that act of parliament, it would. That by the same reason, by which the word plaintiff in that part of the act of parliament, was to be extended to a plaintiff in error, the word defendant should likewise.

* It was further urged, That the pleading double was at their own peril; for if the court had not power by this act of parliament, to grant them leave to plead double, the other side may demur.

* P. 327.

Easter Term 2 Geo. I.

And to this opinion the court inclined. But the court made their motion fruitless, by declaring, That one of the things they designed to plead, did upon the record, appear to be false.

Rench and Britton. B. R.

Sheriff:
Debt upon
bond.

DEBT upon bond: The condition upon oyer was, That if the defendant did appear, &c. *ad respondend' præfat' Johanni Rench de placito transgr. ac etiam billæ.* The defendant pleads the statute 23 H. 6. about sheriff's bonds; plaintiff demurs.

For the de-
fendant in
demurrer.

For the defendant in demurrer, it was insisted, That the condition of the bond varied from the writ. The writ was *ad respondend' præfat' Johanni Rench de placito transgressionis, &c. ac etiam billæ ipsius Johannis*; which words *ipsius Johannis* are omitted in the condition of the bond.

It was said, that this statute being made to prevent oppression, was to be taken strictly; and several cases cited to prove, that the least variation, or addition to the condition; of the bond not warranted by the statute, makes the whole bond void; as *Term. Mich. 37 Hen. 6. fol. 1. 10 Co. 100. b. Plow. Com. 68. b. Hobart 13.*

* P. 328.

But the case chiefly relied upon, as a case in point, was *Moore and Finch, 2 Lev. 177*, where the action was debt upon bond, conditioned to appear before his majesty at *Westminster*, to answer *A.* of a plea of trespass, and also of a bill to be exhibited against him for 100 l. The defendant pleads the statute of 23 H. 6. and shews that the writ was to appear *coram Dom. Rege at Westminster, &c.* plaintiff demurs. And upon argument, the opinion of the court was against the plaintiff; 1st, Because the condition of the obligation was to appear before his majesty; whereas it ought to have been *coram Dom. Rege. 2^{dy}*, Not said in the condition, whose bill he is to answer; should have been *ipsius A.*

For the plain-
tiff in demur-
ser.

Serjeant *Brantbwayt* insisted, That it must be intended the bill of the plaintiff; and quoted cases to shew, that bonds varying in some minute circumstances from the statute, have been supplied by intendment, 2 *Lev. 128. T. Jones 46*, Condition of the bond to appear before the king's justices at *Westminster*; it was objected, that this was not the title of the court; yet held good. *T. Jones, Wells and Denton*; where said, That the statute does not prescribe any form for the condition of the bond. 2 *Cro. 286*, Condition of the bond to answer the plaintiff *de placito debiti* only; and the writ was to answer in a sum certain; and yet held well.

Court.

Parker, chief justice: The statute only requires, that the sheriff should take a bond, conditioned for the appearance of the party such a day, at *Westminster*; not said even to answer the plaintiff.

The

Easter Term 2 Geo. 1.

The appearance mentioned is a personal appearance.

The *act etiam billa* goes only to the matter of bail; whether common, or special is to be required, and came in use after the statute.

If the whole writ might be omitted, as certainly it may, since the statute does not require it, then any part of it may be so likewise; nor does this bond vary from the form prescribed by the statute. If the party appear, he is bound to answer any bill that shall be filed against him.

The bill in the condition of the bond, cannot be intended of any other, than the bill of the plaintiff.

The rest being of the same opinion; judgment *nisi, pro quer*.

* Stone and Taverner. B. R.

* P. 329.

ACTION of debt upon bond. Upon oyer, the condition of the bond appeared to be, Whereas Stone had lent Taverner, the sum of 1000*l*. for which the better securing, Taverner has executed to Stone an indenture purporting a deed of mortgage, &c. the condition of this obligation is such, That if Taverner shall from time to time, well and truly pay the interest, that shall become due, according to the *provis* in the indenture, until the principal be paid, then, &c. Defendant pleads, That he has paid *tantum quantum* became due; plaintiff demurs.

Squib, pro quer. Defendant's plea ill; because he has not shewn, what was due, nor what he paid; so that no issue could be taken upon it. 20 H. 6. 31. 2 Cro. 359. *Halfey and Carpenter*; bond conditioned to pay J. S. and J. N. so much money *tam cito* as they came of age; judgment upon demurrer *pro quer*. because defendant did not say when they came of age.

Lord chief justice Parker: I am in doubt in this case, whether, tho' the defendant's plea be admitted bad, you can recover, without assigning a breach of the condition of this bond, as this case is circumstanced.

Judge Eyre: The plea of the defendant is undoubtedly naught; because this being a bond for the performance of covenants in the indenture, the indenture ought to have been set forth by the defendant; whereas all that we know of the indenture is by way of recital in the bond.

Chief justice Parker: The indenture need not be set forth. This not a bond for the performance of the indenture; for that is in the nature of a deed of mortgage for a year, and is a security for the repayment of * the principal sum with a year's interest; whereas the * P. 330.
bond

Easter Term 2 Geo. 1.

bond is a security, not for the principal but interest; nor for a year's interest only, but for the interest of a 1000 £ until it be paid, which now appears to be nine years more than the deed. As for those words in the condition of the bond, *according to the proviso in the indenture*; they must necessarily and can relate only to the proportion of the interest.

Mr. Squib seeing the court thus fluctuating in their opinions, took another objection to the plea of the defendant.

The condition of the bond was to pay to *John Stone*, his executors, administrators and assigns; in his plea the defendant says, That he paid to *Robert Stone* the interest that from time to time, &c. and does not shew, that *John Stone* is dead, or that *Robert* is his executor.

Judgment *pro quer. nisi*.

Child and Pierce. B. R.

Assumpsit.
Action upon
the case.
Pleading.

THIS was an action upon the case, upon several promises, brought by the plaintiffs, as assignees of a commission of a statute of bankruptcy against *J. S.* Judgment by default; and writ of inquiry executed.

For the
plaintiff
in error.

In a writ of error brought to reverse this judgment, it was insisted, That the declaration of the plaintiffs was naught. For they declare, that the defendant was indebted to them, as assignees of a commission of bankruptcy against *J. S.* in the sum of 320 £. for so much money had and received by the defendant from the bankrupt; and not said, That the money was the money of the bankrupt.

* P. 331. It was acknowledged, That in pleas of bar, which may be supported by common intendment, this way of * pleading might possibly be admitted, and the money be intended the money of the bankrupt; but not in a declaration, where the words shall ever be taken in the strongest sense against him that pleads them.

Formerly in actions of debt, the whole agreement was used to be set forth; but now of late, a more concise way of pleading, has in actions upon the case obtained. And yet even now to declare in an *indebitatus assumpsit*, for goods sold and delivered, would be naught upon demurrer.

Econtra.

It was argued on the other side, That this declaration was good; for that first of all, this declaration sets forth, that the defendant was indebted, and then goes on and shews how, viz. by money received by

Easter Term 2 Geo. 1.

by the defendant, i. e. by a necessary intendment, such money as will create a debt, the money of the bankrupt.

Hicks and Cockum, Term. Trin. 12 Annæ Judgment in C. B. by default; and upon error brought, it was insisted, that the declaration being for goods and merchandizes to the defendant *per eundem* the plaintiff before that time sold and delivered, &c. and not said the goods of the plaintiff, was naught. But the court was of opinion, That the word *indebitatus* did necessarily import, that they were the goods of the plaintiff.

Atborpe and Jones, Term. Trin. 1 Geo. judgment by default in C. B. writ of error brought.

Declaration set forth, that the defendant was indebted to the plaintiff in so much money for the use of a coach horse of the plaintiff's, delivered by the said plaintiff to the defendant.

It was objected, that this delivery did not necessarily import a debt; for possibly, the defendant might be to pay nothing for the use of him. But the court were of opinion, that such a delivery must be intended, as did create a debt. *Adjournatur.*

* Trinity Term

* P. 332.

2 Geo. 1. B. R.

Clarke and Elwick.

MOVED for a rule against a man to shew cause, why he should not make an affidavit of his name being subscribed to an arbitration-bond; several affidavits being produced, that he had several times owned his being a witness, but refused to make affidavit.

Motion for a rule upon a witness to an arbitration-bond to make an affidavit.

Trinity Term 2 Geo. 1.

Generally true, that men must not be compelled to make affidavits. Stat. 9 & 10 W. 3. cap. 15.

Urged in behalf of the motion, That tho' it be generally true, That no man can be compelled to make an affidavit; yet it must not hold true in the present case, because then the statute 9 & 10 W. 3. cap. 15. will be intirely eluded, viz. That all persons that agree to end their differences by an arbitration, may agree to have this their submission made a rule of any of the courts of record, and may insert this their agreement in the submission, or condition of the bond, or promise; and upon producing an affidavit of such inserting, and upon reading and filing such affidavit, the same may be entered of record in such court; and a rule of court thereupon, &c.

* P. 333.

* Court first made a rule upon him to shew cause, why he should not make the affidavit desired and the next term, viz. Trinity, they made the rule absolute: being unanimously of opinion, That they had a power, by rule of court, to compel such persons as are witnesses to an award, to make affidavits of their being so. And whereas it was objected, that there were no compulsory words in the act of parliament; it was said, that this was not necessary. That the very nature of the thing gave the court a jurisdiction. That the person by subscribing his name as a witness, had undertaken to give evidence at a proper time, and in a proper manner; and that here, the act of parliament having made it necessary for the evidence to be given by affidavit, the refusing to do it was an injury to the party concerned; and that in a matter belonging to the jurisdiction of this court.

On breach of an award made a rule of court, the party may proceed both by action and attachment at the same time. Salk. 73.

And as to the objection, that the party had here made and determined his election, which the law gave him, either to proceed by action upon the arbitration-bond, or to make the award a rule of court: It was answered, that the party might at pleasure resort to this new remedy given by the statute; and that tho' he should have got even judgment upon the bond; for perhaps, an attachment upon this rule of court, a more quick and effectual process, than suing out an execution upon a judgment.

Writ issuing out of another court, and returnable here, court may compel proper officer to make a return.

Similiter the court may compel the making an affidavit in the present case.

* P. 334.

* — County of Hereford. B. R.

Settlement. County gaol, as to settlements, considered as situate in every parish in the county.

S A I D by Lord chief justice Parker, the rest assenting, That the gaol of the county was with respect to settlements, to be considered as situate in every parish in the county. That therefore the removing of a person to gaol did not make any alteration of the settlement; and that consequently a bastard child born in the county gaol, was to be esteemed as gaining a settlement by birth, in that parish, where the parent was settled, when sent to gaol.

Trinity Term 2 Geo. I.

Harvey of Comb's Case. B. R.

A COMMITMENT for treason generally, without expressing the species of treason, good; for the process the same in one sort of treason as in another.

The Court of King's Bench have power to bail in high-treason, notwithstanding the suspension of the *habeas corpus* act.

And upon an affidavit made, that the prisoner was in such an ill state of health, that longer confinement would bring his life in danger, it has been done. Lord Montgomery's case.

2 S. T. 386.
Commitment for high-treason generally good.
High-treason bailable by B. R. Salk. 103, 104.
But see 8 Mod. 93, &c.

Carrington and Warren. B. R.

COURT was moved, that the executor being likewise heir at law, might have leave to plead double, viz. *solvit ad diem*, and *riens per descent*, to an action of debt upon a bond.

Motion for leave to plead double.

Court refused the motion, without an affidavit, that he had *riens per descent*. The same law in case of an * administrator, who shall not be allowed to plead *plene administravit*, and no assets, without affidavit. For this a matter incumbent upon the plaintiff to prove, and yet lies more in the knowledge of the defendant than plaintiff. Duty of the court not to assist the defendant, by giving leave to plead double, but upon probable ground, that the demand of the plaintiff, *quoad* the defendant, cannot be maintained.

* P. 335.
An heir shall not have leave to plead *riens per descent* with another plea, except he make affidavit, that he has *riens per descent*. Nor shall an administrator have no assets.

King versus Dixon and his Wife. B. R.

THIS was an indictment against Dixon and his wife, charging, That they & *uterque eorum* did unjustly and unlawfully such a day *et diversis aliis diebus* & *vicibus tam antea quam postea* keep a common gaming house, *contra pacem* & *formam statuti*, &c. And to this indictment the defendant demurs.

Baron and Feme. Indictment against man and his wife for keeping a gaming-house.

The 1st objection taken against the indictment was, that it should not have been brought against the husband and wife; but the husband only.

Court: This objection would have weight in it, if the property or ownership of the house was the matter in question; but it signifies nothing here, where not property, but a criminal management of the house, (in which the wife may probably have as great, nay a greater share than the husband) is the fact charged.

The

Trinity Term 2 Geo. II.

Ant. 63. This case not to be distinguished from the case of *The Queen* and
Salk. 384. *Williams*, which was an indictment against husband and wife, for
keeping a bawdy-house, and held good; for as there the wife may be
concerned in acts of bawdry, so here she may be active in promoting
gaming, and furnishing the guests with all conveniencies for that
purpose.

* P. 336. * The 2d objection was, that it was charged in the indictment, that
they *et uterque eorum* kept a gaming-house, &c. which was wrong; for two persons cannot jointly and severally keep a house; the keeping of the house by the husband and wife, is not a keeping the house by the husband only, or by the wife only. For this purpose was quoted, 2 Rolle's 51, an indictment against four persons for using the trade of a plumber, *contra* Stat. 5 Eliz. The indictment, that they four *et uterque eorum* used the trade, held naught; because the user of the one could not be the user of the other.

Salk. 382. *Court*: The case in *Rolles* not applicable to the present case. For there the using of the trade, not being the offence; but the using the trade, without having served an apprenticeship, (an act to be performed by each singly and severally) it was an offence that was in its own nature impossible to be committed jointly. Whereas here this may be committed by both jointly, and the addition of *uterque eorum*, is but a further specifying and corroborating the former charge; for whoever says that both of them did keep, &c. does in truth and consequence say, that each of them did so.

3. 3dly, It was objected, that this indictment was upon a particular statute, *viz.* Stat. 33 H. 8. cap. 9. sect. 12. which statute chalking out a particular method of proceeding, for the recovery of 40s. per day, the party could not proceed by indictment.

Keeping a gaming-house, a nuisance at common law. *Court*: Keeping of a gaming-house, an offence indictable at common law, as a nuisance; nor will the conclusion of the indictment, *contra formam statuti*, bar the party from supporting the indictment by common law, supposing it could not be maintained upon the statute.

* P. 337. * But the court were clear of opinion, that an indictment was not taken away by any words in the statute: So far from it, that there were words in the statute, which unless they had relation to proceeding by indictment, must have no sense nor signification at all.

Where the statute makes the offence, no other remedy can be pursued, but what the statute makes. For the first, this difference was taken, That where a statute creates, or makes a thing an offence, that was not so before by the common law, gives a certain penalty, and prescribes a method for the recovery of it, there the act must be pursued: *contra* of an offence at common law, for which an act gives a new penalty, or a new remedy;

Trinity Term 2 Geo. I.

days; for there the remedy at common law shall not be taken away without negative words.

For the second, the words of the act insisted on were, *to be recovered by, &c. or otherwise*; where it was said that all the remedies, or different ways of proceeding, besides by indictment, having been enumerated before, those words *or otherwise* must be understood of indictments, or nothing.

tute gives
otherwise of
a crime in-
dictable be-
fore.
Salk. 460.

It was objected, That if this were to be considered, as an indictment for a nuisance at common law, it would not be good for want of concluding, *ad commune nocumentum* of the King's subjects.

Court: Not necessary to conclude so here; the offence in its own nature importing that it is so. Besides, the word *common* supplies this defect, if it were one.

Lastly, it was objected, That as this indictment was laid, the penalty of 40 s. a day given by this statute could not be recovered; for not said that *per spatium* of one day, or several days they kept, &c. but only that such a day, &c.

Court: Keeping a common gaming-house any part of the day enough. Indeed more days might have been laid, for the time so uncertain as to all but one day, that only 40 s. recoverable.

P. 338.

Judgment pro King nisi.

Michaelmas Term

3 Geo. 1. B. R.

Fazakerley, Chamberlain of London, versus Wiltshire.

By the
city of Lon-
don
See Salk.
143, 192.
Str. 462.

THE only question was upon the validity of a by-law in the city of London, that none but free porters should intermeddle with the carrying or unloading of corn, salt, or sea-coal, or any other goods out of any barge, lighter, &c. between *Stains bridge* and *Kendal* in the county of *Kent*, that are to be imported into the port of *London*, under the penalty of forfeiting 20 s. for each offence; except in time of danger, and to save the losing of goods.

It was argued against the by-law by *Peer Williams* to the following effect.

- * P. 339. * The by-law restraining the number of carts in the streets of *London*, did not prevail without the greatest difficulty; and the main reason for which that by-law was adjudged good, was, that an unlimited number of carts would occasion stops, and be a nuisance to passengers.

A navigable river in all respects like a highway; to be free to all, and none ought to be debarred from using it.

A man cannot certainly have a more natural right to any thing, than the free use of his bodily labour; and therefore a by-law, that shall restrain a man from the use of *that*, as this does, must be naught; especially when no recompence is given in lieu of it.

To the performance of this employment, the serving an apprenticeship not necessary; for it requires not skill, but strength.

This is a by-law that enhances the price of carriage, and encourages idleness.

The

Michaelmas Term 3 Geo. I.

The extent of this by-law, from *Stains* bridge to *Kendal* in the county of *Kent*, much too great.

The king by his proclamation could not make such a by-law ; and certainly no derivative power can be greater than the primitive.

Not so much as an exception in this by-law, for the owner of the goods, or his own servants ; so that according to this law, a man can neither carry his own goods, nor employ his own servant, &c.

This by-law penned in obscure and ambiguous words ; very uncertain what act may amount to intermeddling ; perhaps the helping and assisting a free porter, tho' at his own request, may be construed such.

From all these reasons put together he concluded, that this by-law was both unreasonable, and prejudicial to the subject ; and therefore void. Cases quoted by him in his argument were, *Lutwyche Rep.* 564. *Moore* 591. 1 *Rolle's Abr.* 394. 2 *Brownlow* 177. *Cartet* 68, 118. *Jones* 144. 3 *Mod.* 158.

* *Banneaux and Plastead.* B. R.

* P. 340.

A DECLARATION was delivered generally as of the last term ; and in that declaration it did appear, that the cause of action did not arise before the middle of that term. Upon a verdict for the plaintiff, it was moved in arrest of judgment, that the declaration being as of the last term generally, must have relation to the first day of the term ; and consequently the declaration will in point of law be antecedent to the cause of action.

Record.
Memorandum, when necessary, may be entered upon record, to explain the day in the term, to which the declaration belongs.

It was urged by the counsel for the plaintiff, That by entering of a special memorandum upon the record, viz. such a day of the term, which would not contradict but explain the record, this motion would fall to the ground ; and that this might be done without moving the court.

Parker and Pratt of opinion, that they might enter this memorandum of course, and without leave ; and the rather because here was no deceit, as to the defendant ; for he very well knew, that he was not arrested, nor bail put in, until the middle of the term ; and consequently that this declaration could not be as of the first day of the term.

Eyre of opinion, That the special memorandum ought to be entered ; but that the proper way was by motion.

Upon which serjeant *Cbesbrey*, to end the dispute moved for leave ; and had it.

Queen

Michaelmas Term 3 Geo. I.

* P. 341. * Queen and Simpson. B. R. See Ant. 248.

Question,
Whether a
deer stealer
having been
summoned,
and not ap-
pearing, may
not be con-
victed in his
absence?
Stat. 3 & 4
W. & M. cap.
10 about
deer stealing.

THIS was a case, that had been long depending; and the only question reserved to be spoken to, was, whether upon the statute of 3 & 4 W. & M. cap. 10. about deer stealing, the justices of peace might convict the offender in his absence, upon his default to appear, being duly summoned? Or whether the justices ought not by issuing out their warrant, for apprehending the party, have compelled him to appear?

Reeves for the latter side of the question.

The statute being silent in this matter, the rules of common law ought to be pursued, as far as possibly they can.

The judgment of the justices in this case is final, and no re-examination; natural justice requires, that the justices should have the party brought before them, if possible.

Stat. 33 H. 8.
cap. 20. the
first stat. that
gave leave
for any man
to be tried in
his absence.
Alt. 1 & 2
P. & M. 10.
A *capias* lies
for a trespass
at common
law.

The stat. 33 H. 8. cap. 20. the first statute, that gave leave for a man to be tried in his absence; but this statute was held to be by consequence and implication, repealed by that statute of Philip and Mary, whereby all trials are left to the course of the common law. *Staudford* de 90. b.

The consequence of a conviction upon this statute, very penal, viz. for want of sufficient distress, a year's imprisonment and pillory.

Subject matter of this statute a trespass at common law, in which case a *capias* lies; therefore the justices here ought to have issued out their warrant, which is their *capias*.

* P. 342. No words in this statute, that give justices a power to convict without appearance; if they have it by * implication, it is a greater power than is vested in the judges of *Westminster-hall*.

By this act of parliament a corporal punishment is to be inflicted; and according to the rules of common law, where the judgment is to be corporal punishment, judgment cannot be given in the absence of the offender.

Even in attainders by parliament, execution cannot be awarded without the person be present, and asked whether he has any thing to say, why judgment should not, &c.

But the very statute we are now upon, plainly supposes the party should be present; for in the 4th sect. power is given, for fear the offender after conviction should escape, to the constable, other officer, or person prosecuting, to *detain*; which plainly imports his being present.

It is observable, that tho' by the statute the power of convicting is given to the justices of the county where the offence is committed; yet in case the party fly, and is apprehended in another county, then this

Michaelmas Term 3 Geo. I.

this power is devolved to the justices of that county where the party is taken, purely that the party may be present when convicted.

As to the objection, that this construction will render convictions difficult; because a person may be summoned, when he cannot be taken. The answer is, that if summons in this case were sufficient, it must certainly be a personal summons; and he that can be personally summoned, may be taken.

Portescue, solicitor general, *contra*.

By the statute which we are now upon, a new judge and a new way of proceeding is established. The very design of the statute is to prevent those delays, that attend the forms of common law process. The proceedings in this case, where the statute is silent, and does not interpose, to be conducted by the rules of natural justice.

* He denied the rule laid down, that in summary proceedings the rules of the common law are to be observed; especially such rules, as would directly overturn the nature of a summary process, and make it more prolix, &c.

P. 343.

If this act of parliament had not intended to have pared away all the forms of common law, some of the proceedings by the common law, would have been taken notice of by the act.

It is very expressly set forth in the conviction, that the party was duly summoned, and had notice to appear and shew cause, why he should not be convicted.

This is all, that the rules of natural justice require; he might have appeared if he pleased; and surely he shall not take advantage of his own wrong, or else it will be in the power of any person at pleasure, to avoid being convicted.

As there are no words in the act of parliament, that give a justice of peace power to convict in the absence of the offender; so neither are there any words in the act, that make his appearance necessary: If therefore the act of parliament is silent, and may be expounded either way, that exposition ought certainly to prevail, which will render the act most effectual.

This is not to be considered as a criminal proceeding, but a civil one for a certain sum of money.

11 Co. 93. *Bagge's case*; a person may be disfranchised, lose his freehold, if when duly summoned he will not appear; and the constant practice is to proceed to disfranchisement, in the absence, &c. if the party being duly summoned refuse to appear.

Nay this point was carried one step higher in *Glide's case*, Trin. 4 Will. & Mary; for it is there held, That if the party lives out of the town, he need not be summoned; and the reason is, because it was his duty to attend.

N. B. There were two convictions; and in one of them, the party before conviction was heard by his attorney: Therefore it was observed by the Solicitor General, That tho' strictly speaking, accord-

P. 344.

Michaelmas Term 3 Geo. I.

ing to the forms of law, the offender could not make an attorney to appear for him; yet in this case, where the process is of a summary nature, and the rules of natural justice principally to be regarded, it is material, that any person was heard in his behalf; because then it cannot be said, that the person was condemned unheard.

No case or authority quoted to shew, that the justice has a power to apprehend.

Hob. 97.
Statutes
ought to be
so expound-
ed, as not to
elude the
force of 'em.

It is true, that where an act of parliament is plain, consequences are not to be regarded; for that were to assume a legislative authority: But where an act of parliament is doubtful, there the consequences are to be considered; and care is to be taken, that such an interpretation, be not put upon the act, as will quite elude the force of it; and that will be the case here, if there can be no conviction, but upon the appearance of the party.

Usual for the
commission-
ers of hack-
ney-coaches
to convict up-
on summons,
without ap-
pearance.

Whereas no inconvenience, no breach of any rules of natural justice attends the other interpretation, statute 5 & 6 W. & M. cap. 22. about hackney-coaches almost a parallel case; and the general practice of the commissioners there, is to convict without appearance, upon a summons.

Judgment
may be given
in the absence
of the offen-
der.

Parker, chief justice. A court may perhaps in prudence, not care to give judgment in the absence of the party; but I see no reason but that it may be done, and I take it to have been done in *Mawgridge's* case.

But execution
cannot be a-
warded other-
wise than in
the presence
of the party,
and why.

Execution cannot indeed be awarded but in the presence of the party; but *that* depends upon this reason, that there may possibly be a mistake of the person; or some other reason may have happened, subsequent to the judgment, why execution should not be awarded, which it is but reasonable the party should have an opportunity to insist upon.

* P. 345.

* But here had the party appeared, it is taken for granted, judgment might have been given in his absence.

I am of opinion that the summons must be personal; and therefore altogether as easy to take, as to summon.

The act plainly supposes, that the justices have a power to apprehend him; or else the clause would be a nugatory clause, which supposes the offender may be apprehended.

The expression of *detaining* does likewise suppose him present; otherwise the act should have run thus, *in case he be present*.

Statutes
ought to be
interpreted
by the rules
of common
law, in like
cases.

It is a known and general rule, that a statute ought to be interpreted by the rules of common law; and therefore since this is in nature of a trespass, for which a *capias* by common law lies; since the act plainly supposes justices of peace have a power to apprehend him, and that they will execute this power; and since it is as easy to apprehend, as it is to summon, I am of opinion at present, that the justices ought to have the party before them.

Judge

Michaelmas Term 3 Geo. 1.

Judge *Pratt*: If a justice of peace has a power of issuing out his warrant, for the bringing of the party before him, it must be given him, either by the express words of the statute; or as a power incident to the jurisdiction, the statute invests him with; if the latter way, I fear, he must have the same power allowed him in all summary proceedings.

If a summons be sufficient, I know not why the same summons should not do here, as in other cases, viz. the leaving at the usual place of his abode, *where* the party cannot be found; and then a person may be summoned, when he cannot be taken. *Adjournatur.*

Vide Post. Hill. 3 Geo. 1.

* Corporation of Banbury. B. R.

* P. 346.

PARKER chief justice: If a Mayor be not chosen by the time prescribed by the charter; and there be no provision in the charter for the old Mayor's continuing on, until a new Mayor is chosen in, the corporation is dissolved; and consequently cannot proceed to a new election.

Whether a corporation can subsist without a head? *1 Mod. cases in law and equity 129.*

Indeed some are of opinion, That this may be cured, by the issuing out of a writ under the great seal, empowering them to proceed to a new election; but others are of opinion that even this will not do, and that there is no other remedy but to obtain a new charter from the crown. But nobody ever thought, that in such a case the *quondam* corporation could revive itself, by choosing a new head, without such a writ under the great seal.

Johnson and Louth. B. R.

THE question was, whether a gunner was within the late act of parliament, that orders those listed as soldiers, to be discharged from arrests for debt.

Soldier. Stra. 7. Question, Whether a gunner be for debt?

It was objected, That they were not within the act; because they were warrant officers, and took a particular oath; and because the makers of this act of parliament seemed apprehensive that they would not have been liable to the same punishment, in case of mutiny and desertion, as other soldiers, unless they had by an express clause made them so.

He is liable to the same punishment, in case of mutiny and desertion, as other soldiers.

It was likewise insisted, That the design of the act, being to encourage men to enter into the king's service, must not be extended to such in the army, whose pay was so considerable, as that this alone would be a sufficient inducement. The pay here was 1 s. 4 d. per day.

Hilary Term 3 Geo. 1.

* P. 347. * *Court* : As to the clause in the act relating to mutiny and desertion; the act only supposes it possible, that there might be a doubt; and therefore wisely resolves to make every thing clear, where the punishment to be inflicted is nothing less than death. But then the act of parliament resolves the doubt, as we do now, that he is a soldier.

A trooper privileged by the stat. from arrests for debt, as well as other soldiers. The matter does not turn upon the *quantum* of the pay; if it did a trooper most certainly would be out of the act, whose pay is much more considerable than that of the gunner, and who generally gives a good sum of money for his place.

The reasons why a gunner's pay is more considerable than that of the soldier, are *1st*, in respect of their skill; and *2^{dly}*, the hazard they run; both which considerations render their service more necessary, and make it more reasonable, that they should not be taken away from the service.

Accordingly he was discharged.

* P. 348.

* Hilary Term

3 Geo. 1. B. R.

Cole and Hawkins. See Ant. 251.

Assumpsit.
Stra. 21.
In transitory
actions time
and place not
material.

ASSUMPSIT. The plaintiff declares upon a promise made the 16th of Jan. 1706. The defendant pleads in bar the statute of limitations; and that the cause of action did not accrue within six years before the exhibiting of the bill. The plaintiff replies, the bill was exhibited the 23d of Jan. 1713; and that cause of action did arise within six years before exhibiting the bill.

To this the defendant demurs.

Now

Hilary Term 3 Geo. 1.

Now *Parker*, chief justice, delivered the resolution of the court.

Judgment must be given *pro quer'*. For this being the case of a parcel promise, the day in the declaration is not material; and therefore the plaintiff in his replication, has only departed from an immaterial part of his declaration; which would be cured by a verdict, and is now aided upon a general demurrer, by statute for amendment of the law.

Such defects in pleading, as are only matters of form, and would be cured by verdict, are now aided upon a

general demurrer, by stat. for amendment of the law.

* Were it more than matter of form, a verdict finding the promise at another day, could never cure it, as most certainly it would. * P. 349.

And for this purpose, was quoted the case of *Lee and Rayne's*, 1 *Lev.* 110, reported likewise 1 *Keble* 566, 578, where this learning laid down, That for the plaintiff in his replication, to vary from the time or place in his declaration, in order to follow the defendant's plea, is not a departure.

Varying in the replication from the time or place laid in the declaration, is no departure in the old books.

ture in transitory actions, *Salk.* 222. Tho' it would have been a departure by the

In the old books indeed this would have been a departure, 22*d* *Assise* 86.

And unless what strictly speaking is a departure, be sometimes allowed; unless the plaintiff, where the defendant by his justification, makes the time or place material, may follow the defendant's plea, tho' it lead him to another time or place; all that doctrine, That in transitory actions, where time and place are not material, the plaintiff may declare at any time or place, must fall to the ground.

In transitory actions, where time and place are not material, the plaintiff may declare at any time or place.

Judgment *pro quer'*.

Burgh and Blunt. B. R.

SERJEANT *Chefshyre* moved for an attachment, against the judge of the court of *Holderness* in *Yorkshire*, for disobeying a *tolt*, whereby the cause was to have been removed into the county court, from whence, as the serjeant believed, the parties designed by a *pone* to remove it into the court of *C. B.* and tho' by a *recordare*, it might have been removed at once, into the court of *C. B.* yet the parties might take this way, if they pleased.

Motion for an attachment for disobeying a *tolt*.

It was urged by the serjeant, in behalf of his motion, That disobedience to the *tolt* was a contempt to the law of the land, over which the court of *B. R.* were guardians: that that court was invested with a general * jurisdiction over inferior courts; and was to * P. 350. take care, not only that they did not transgress their jurisdiction, but Ant. 48, 60. likewise that they proceeded regularly in matters confessedly within their jurisdiction.

Hilary Term 3 Geo. 1.

Judge *Eyre* : The more proper way is first by *mandamus* to oblige them to obey the *tolt*; and if not notwithstanding *that*, they proceed, an attachment may be granted for disobedience to the *mandamus*.

I do not see, why we may not as well grant an attachment against the judge of a spiritual court, for proceeding after an appeal, as do what is now asked.

Parker, chief justice : Several other remedies besides that desired. You may have a prohibition; or you need make no defence, and bring your writ of false judgment; and when they shall return that they were served with the *tolt*, as they must, it will then appear, that all the proceedings are erroneous; for their jurisdiction failed, upon the receipt of the *tolt*.

But the serjeant pressing his motion, and serjeant *Page* affirming, that he had the motion granted him, in the case of *King and Langston*, the court made a rule to shew cause, why an attachment should not be granted.

King and Theed. B. R.

Motion to supersede a writ de excommunicato capiend, before the return, and granted.

THE court was moved to supersede a writ *de excommunicato capiend*.

The objection to the writ was, that it was too general; and that it did not appear, that the causes, for which the party was to be imprisoned by the writ *de excommunicato capiend*, were of spiritual co-nufance; * for it was only *in quodam negotio* concerning the correction and reformation of manners.

* P. 351.

To this it was said, that the same strictness is not required in writs as in libels; and further it was much insisted upon, that he was said to be excommunicated, according to the canon; and the cases of the *King and Toseland*, and the *King and Fowler* were quoted.

Salk. 293.

In the writ de excom. cap. the special cause must be expressed.

But the court were clearly of opinion that the writ was too general.

Then it was insisted upon, that the motion for the *superfedeas* was made too early; because before the sheriff had returned the writ; and to this purpose 1 *Siderfin* 181, was cited.

Parker,

Hilary Term 3 Geo. I.

Parker, chief justice : This is a writ which issues out of chancery, returnable into this court, and delivered to the sheriff in the presence of the justices ; and this whole matter is entered upon record. Now when the court of chancery have issued out this writ, and it is delivered to the sheriff, the chancery, if applied unto for a *superfedeas*, would probably say, they had nothing to do with it.

Writ de ex-
com. cap. if
sues out of
chancery,
returnable
in B. R.
Chancery
can't super-
fede it.
Salk. 294.

And then if the court of B. R. cannot grant a *superfedeas* before the return, the consequence will be, that a subject may for a long interval of time, *viz.* between the delivery of the writ to the sheriff and his return, be wrongfully deprived of his liberty, without possibility of redress.

The command to the sheriff to execute the writ, is the command of the king ; and the question is, Whether this court, shall let the sheriff execute that writ, when the execution of it is intrusted to them, and an entry of record made of it, where the writ appears to the court to have issued out erroneously.

* Certainly this court might have quashed it, before it was delivered * P. 352.
to the sheriff ; *a fortiori* therefore now ; for it is no more, than for us to correct our own mistakes, call back a writ that issued thro' our oversight.

Eyre, Judge : The return of the *habeas corpus*, no relation to the writ *de excommunicato capiendo*, which intirely destroys the authority of the case in *Siderfin*.

I take this court to be possessed of the cause by the entry of the writ upon record, and delivery over to the sheriff.

The writs that go out of this court, if they issue erroneously, are frequently superseded before the return ; tho' those writs as much out of the hand of the court, as this writ.

Pratt, judge : I take the reason of the provision, that this writ issuing out of chancery, and returnable into this court, must first be opened in this court, and in the presence of the justices of this court be delivered to the sheriff *exequend'*, to be a provision in favour of the liberty of the subject, that a subject may not be deprived of his liberty, by writs that issue of course out of chancery, until such time as the judges of this court, see whether he has deserved it or not.

To say this writ cannot be superseded before the return, is as much as to say, that this court shall not correct their own mistake, until the mistake has occasioned as much mischief as possibly it can.

Chief justice *Parker* : This writ is actually entered upon record ; for the entry is *delib' fuit* in the presence of the justices, to the sheriff *exequend'*.

The writs that issue out of this court, never entered at large upon record, before the return, tho' in strictness they ought ; but here the writ is always entered at large.

The

Hilary Term 3 Geo. 1.

- * P. 353. * The superseding of our own writs, before the return, is a sufficient proof, that writs may be superseded, tho' not in court. The obligation of the sheriff to execute this writ, results from an Act of this court; and ought therefore to be subject to the controul of this court.

Maxim.

It is a general rule, That whenever the court is possessed of a record, they will proceed upon it.

And upon this ground it is, that if the plaintiff in an appeal becomes nonsuit, the court will nevertheless oblige the party to plead to it.

The writ de excom. cap. never superseded before the return, until now.

In fact these writs have not been superseded before their return; but I see no reason why they may not.

A supersedeas was granted accordingly.

College of Physicians v. Dr. West. B. R.

Question,
Whether a
person having
taken the de-
gree of Dr. of
physick, in
either of the universities,

THE question was, whether a man, that had taken his degree of doctor of physick, in either of the universities, might not practise in *London*, and within seven miles of the same, without a licence from the college of physicians?

either of the universities, might not practise in *London*, without a licence from the college?

The court clear of opinion, that a licence from the college was necessary; and that by reason of the charter of incorporation, confirmed by 14 & 15 H. 8. cap. 5. penned in very strong and negative words,

- * P. 354. As to the testimonials granted by the universities, upon a person's taking the doctor's degree; the court was of opinion, that these testimonials might have the nature of a recommendation; they might give a man a fair reputation, but conferred no right; and consequently all those statutes, which have confirmed the privileges of the universities, could revive or confirm * nothing, but the reputation, that this testimonial might give such graduates.

And whereas it has been insisted, that by the last clause of this statute, it is said, that none shall practise in the country without a licence from the president and three elects, unless he be a graduate of one of the universities; it was said all the inference from *that* would be, that possibly two licences may be necessary where a person is not a graduate.

In the case of Dr. *Lewet*, Lord chief justice *Holt* did not think this a question worth being found specially.

The college of physicians without doubt more competent judges of the qualifications of a physician, than the universities; and there may be many good reasons for taking a particular care of those, that practise physick in *London*. *Adjournatur*.

Queen

Hilary Term 3 Geo. II.

Queen and Aires. B. R. See *Ann.* 258.

LORD chief justice *Parker* gave the resolution of the court.
We are all of opinion that judgment must be given for the king, and against the defendant.

The first objection is, that a *scire facias* is not the proper remedy, the king not being concerned; but that an action upon the case should have been brought.

As to this, *Sir Oliver Butler's case*, 3 *Lev.* 220, is an express authority, that a *scire facias* is the proper way; and that the crown *de jure* ought to permit subjects to sue in the name of the king.

A *scire facias* is a writ of right, where the patent is injurious.

The second objection, That there should have been an office found, may be answered by the same authority; for the objection was there taken, and held, * that no office was necessary, because there was * no forfeiture.

P. 355.

As to the objection arising from the days upon which, &c. The answer to that is, that it is matter of evidence, of which the jury are the proper judges.

Bracton Lib. 4. cap. 46. shews how the law anciently stood, with respect to different days and distances, within which fairs and markets could or could not be held.

Markets in *London* very close upon one another; and the public good requires it should be so, which will over-balance a private detriment.

Another objection was, that it was said, that the grant was to the prejudice; whereas it should have been, that the markets were to the prejudice. And in favour of this objection, 11 *H.* 4. 5. was quoted.

Answer. In the case quoted, the grant was conditional, viz. so far as it should not be prejudicial; and therefore I doubt not, but in that case, if there had been a prejudice, an action upon the case would have lain, notwithstanding the grant; but the case before us, is the case of an absolute grant, which is to be set aside, because it breaks in upon another's right.

The finding in the *ad quod damnum* is thus, it would be no damage if we grant. What would be no damage? The grant.

As to the objection, that the *scire facias* was discontinued by the death of the queen; we are all of opinion, that this is helped by the stat. 1 *Ann. cap. 8.* penned in the strongest terms imaginable.

Judgment was given against the defendant.

VOL. X.

Q q q

Thornby

Hilary Term 3 Geo. II

* P. 356. *Thornby and Fleetwood*. B. R. See Ant. 113.

See Stra. 318. **J**UDGMENT having been given for the defendant in *C. B.* a writ of error was brought in *B. R.*

Argument
pro quer. in
error.

Mr. Reeves pro quer. in error.

This case depends upon the construction of three acts of parliament; all of them acts made *pro bono publico*, to prevent the growth of popery; and therefore they all ought to have a large and liberal interpretation, such an interpretation as will best answer the design of their making.

Stat. 1 Jac.
not repealed
either by
3 Jac. or
3 Car.

The first question in this case is, Whether the stat. *primo Jacobi*, is not repealed by *tertio Jacobi*, or *tertio Caroli*?

That it is not repealed by *tertio Jacobi*, plain enough; because the persons, offences and penalties, in these two acts of parliament, are different.

Nor is it repealed by 3 *Caroli*.

It is not pretended to be repealed directly, and by so many express words; on the contrary it is said in the beginning of 3 *Car.* that the stat. 1 *Jac.* should be in full force.

Such an interpretation, if possible, ought to be put upon these two acts, as that they may both continue in force; especially when the latter act takes notice of the former, as an act in force, and which ought to continue so.

If statute *primo Jacobi* was repealed by *tertio Car.* then the offenders against 1 *Jac.* would be in a better condition after stat. 3 *Car.* than before, which no one can imagine who reads the preamble of stat. 3 *Car.* But this would plainly be the case; their capacity to * purchase would be restored, &c. the stat. 3 *Car.* as to persons already beyond the seas would be intirely ineffectual; for contrary to law, that persons out of the land should be outlawed, unless in some particular cases especially provided for.

* P. 357.

Lord Coke 3 *Inst.* 178. is positively of opinion, that stat. 1 *Jacobi* is in force, notwithstanding the stat. 3 *Jacobi* and 3 *Caroli*.

Stat. primo
Jac. about
Roman Ca-
tholics, how
to be inter-
preted.

The second question in the case, is, Whether any estate will vest in the offender, notwithstanding the stat. 1 *Jac.*

The words whereof, as to this purpose, are: *Shall in respect of himself only, and not in respect of his heirs or posterity, be disabled to inherit, purchase, take, have or enjoy, any profits, hereditaments, chattels, debts, legacies, &c. And that all estates, terms and interests whatever to be made, suffered or done, to the use of any such person, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person, shall be entirely void.*

Hard

Hilary Term 3 Geo. I.

Hard to imagine that all manner of conveyances whatever, should be made void; and yet the capacity of having the lands vest in him, not taken away.

As for those words, *Not in respect of his heirs or posterity*, the meaning of that is only to enable the heir to inherit from any remote ancestor, notwithstanding this incapacity or disability of the more immediate ancestor.

The interpretation contended for on the other side, is directly contrary to the words of the act. For whereas the act says, *That in respect of himself, he shall not inherit, &c.* They say *he shall*, and by that means be enabled by fine, &c. to bar the heir; which if he be protestant, will most certainly be done.

This then is an interpretation flatly against the words of the act, in favour of the offender, and to the prejudice of the heir, who is by the act of parliament, designed to have all the power over the estate.

* *Hobart* 336. mentions two sorts of rights, viz. *Jus acquirendi* & *jus alienandi*, so that according to him, the right of alienating is looked upon as a right or interest * P. 358.

As to the objection, That if this be a right or interest, it is such a one, from which no advantage can possibly accrue to the party; because upon sale the money is forfeited: It may be answered, 1st, That money may be disposed of secretly, may be sent beyond sea, and the forfeiture impossible to be come at.

Besides 2^{dly}, The power of disposing of the estate is a very considerable privilege, tho' he were not to get any money by it.

To the objection framed from those words, *and not in respect, &c.* besides what has been said before, they prevent corruption of blood, and make the punishment personal only.

To the objection, that by interpretation of law, the crown is to have the profits during non-conformity:

It may be answered, that the rule laid down by them, must be admitted for law; viz. That in penal statutes, when the act is silent to whom the penalty is forfeited, the crown shall have it. And so it must have been here, had the words of the act been, *shall forfeit*; and not said to whom. But this is not the case; for here the act creates an incapacity in the offender to take; and if he cannot take, most certainly he cannot forfeit. 1 *Inst.* 13. a. Penalties imposed by statute, and not otherwise disposed of, must go to the crown.

If the King is to have the profits only, and not the estate, then has the king directly the same interest, as he has upon outlawry in personal actions; which is a very precarious interest; for according to 21 *H. 7. 7. a.* this pernancy of the profits may be determined, by the alienation of the person outlawed. It must be owned, that this case is not altogether law, for resolved * *Raymond* 17 and *Hard.* 101. that after inquisition found, the person outlawed cannot alien; a bar. Issues of land forfeited to the king, upon outlawry in personal actions; but alienation before inquisition taken is a bar.

and * P. 359.

Hilary Term 3 Geo. III

Salk. 395.

and so is the case of *Britton and Cole* 9 W. 3. But still at any time before inquisition found, the interest of the king may be defeated, by the alienation of the person outlawed.

Statutes where silent to be interpreted by the rules of common law. Of disabilities by common law.

The act being silent, as to the person who shall take, it must be interpreted according to the rules of common law.

And here it may be proper to consider the nature of disabilities at common law, which are of three sorts.

- 1st, *Propter delictum*, as in case of attainder for treason or felony.
- 2^{dly}, *Propter defectum subjectionis*, as in case of an alien.
- 3^{dly}, *Causa professionis*, as in case of a monk.

Disability propter delictum.

In the first case, viz. Attainder for treason, the estate is forfeited to the king, and the blood is corrupted. A capacity is indeed left in the party to purchase for the advantage of the crown; but a person thus attainted can purchase nothing for his own benefit; neither can he take by descent.

The law is the same in an attainder of felony; save that the lands are forfeited to the lords of whom they are held.

Now the disability in this act of parliament, differs from the former in these respects. 1st, It is temporary, during the non-conformity. 2^{dly}, It is a personal disability only; for it does not corrupt the blood. 3^{dly}, The party is intirely disabled and incapacitated to purchase.

Disability propter defectum subjectionis.

The second sort of disability at common law, is that *propter defectum subjectionis*, as an alien.

And such a one has no inheritable blood in him; he cannot be heir to any body; nor can any body be heir to him. Indeed it is resolved in the case of *Collingwood* * and *Packer*, reported at large in *Ventris*, That this shall not hinder any collateral relation from inheriting.

*. P. 360.

An alien may purchase for the advantage of the crown. This disability comes nearer to the disability created by this act; but yet differs from it: For first, the issue is not disabled by the statute; and secondly, the party is made entirely incapable of purchasing.

Disability causa professionis.

The third sort of disability by common law, is that of a monk; and this disability seems in every respect to agree with the disability created by this act.

A monk cannot purchase; no more can the offender against the statute.

The heir of a monk not disabled from claiming by him; so it is here.

The monk when deraigned to be restored; the offender here when he conforms.

Hilary Term 3 Geo. I.

When the law says a monk is *civiliter mortuus*, this to be esteemed only a similitudinary expression, and what is used concerning other persons, as one that had abjured the realm; for a monk with respect to all the advantages of the church, is as much alive as any other person whatsoever. 1 *Co. Inst.* 132. b.

That interpretation therefore ought to prevail, where the act is silent, as will best square with the rules of law, in like cases.

Thus in 3 *Co.* 85. b. we find the statute *de donis* expounded, in several instances, by the rules of common law.

This statute will be made effectual, if interpreted by the rules of law in case of a monkish disability.

And this likewise will answer the grand objection, What becomes of the estate during the life of *Philip*?

Fitzherbert Mortdaunc. 47. 55. A man has issue two sons, the eldest brother goes beyond sea, father dies, the second son in a writ of *Mortdaunce* recovers the estate, for it seems the being beyond sea, was then looked upon as an incapacity; and yet there held, that upon the return of the elder brother, the * land should be divested * P. 361. out of the younger brother, and revert in the elder.

Philip incurred the disability of being an alien before the descent; and because the law will not cast a descent upon a person disabled by attainder or otherwise, therefore the dutchess does not put up her claim under any of the disabled persons, but as a reversioner. 1 *Ventris* 417.

But to return to the grand objection, *viz.* If the estate in fee should go to him in remainder, or escheat, what is to be done in case *Philip* have issue, or conform himself?

To this it may be answered, 1st, That there are not in the act any words of restitution with respect to the offender himself. Indeed after conformity he is to be discharged from his incapacity; but nothing appears in the act, whereby he is to be restored, to what he has lost during his non-conformity.

In this respect, it may be compared to the effects of denization, with respect to descents to and from aliens. 1 *Ventris* 419.

But if it should happen by accident, that some of the posterity should be hurt; yet is not this a sufficient objection?

It is a received maxim of law, that a freehold can never be in suspense or abeyance, save in cases of absolute necessity. 1 *Inst.* 342. b. Maxim of law. If then the freehold must be in somebody, where must this freehold be but in the reversioner?

In *Plowd.* 48. b. there is an instance of the dodging of a freehold; and tho' this case is in part denied to be law, in 3 *Co.* 10 b. yet there it appears, the freehold must vest in the king, to prevent abeyance.

But the issue of *Philip* may be let in according to the rules of law. 49 *Edw.* 3. 16, there is this case. A tenant of the king devises his executors shall sell his land, and dies without heir; land shall vest in the king; and if the executor afterwards sells the land, it shall revert. * P. 362.

To this purpose, is the case before cited, where, upon the return of the elder brother, the land shall revert in him. And another case there put, A disseisor dies without heir, land escheats, yet the disseisee may bring his action for the land against the Lord; which is a stronger case than *that* before us; for not just that the issue in tail should suffer for the act of tenant in tail. Lord Coke in his 3^d Rep. 61. b. delivers it as his clear opinion, that if a man makes a feoffment in fee, to the use of himself and his wife in tail, then to the use of the husband in fee, has issue a daughter and dies, leaving his wife privily with child of a son, by which means the reversion in fee descends to the daughter; and the wife before the birth of the son levies a fine, or suffers a common recovery: In this case, whether the daughter enters, or does not enter; whether she joined in the fine, was vouched in the common recovery, or did any other act to disable herself, yet the son born afterwards shall have the estate-tail; for not reasonable that any act of the daughter shall prejudice the son *in utero matris*.

Tho' before a late act of parliament, it was customary to vest an estate in trustees, for the preservation of contingent remainders; because by a principle of law, a remainder must vest, either during, or at least when the particular estate determines; yet has it never been thought necessary in case of a remainder actually vested, even before the late statute, to vest the estate in trustees, for the preservation of the inheritance to after-born children.

The Dutchesse might in a *formedon* deduce her pedigree from the donor, taking no notice of the donees, according to 8 Co. 88.

* P. 363.
Argument
pro def. in
error.

Serjeant Chesbire argued *pro def.*
He argued, that the estate must necessarily vest in the offender, to answer the *proviso* in case of conformity; for if the estate does not vest, the encouragement to conformity will be taken away; there being no possibility according to rules of law, for the heir to take, but thro' the ancestor.

He doubted whether the answer to this objection would hold, viz. That the issue should for his benefit be allowed to say, that the ancestor did take, when every body else must say that he did not take.

He observed, that the saving to the posterity, was inserted in the very body of the act, and did not come in by way of *proviso*; which shews it to have been first in the thoughts of the law makers.

He observed, that it was enough for the defendant, if the estate must vest in the ancestor for the benefit of the issue.

He observed likewise, that the title of the defendant, did not necessarily depend upon the validity of the common recovery; because Philip was alive, and either had issue, or (which was all one in intentment of law) was capable of having issue.

Then

Hilary Term 3 Geo. I.

Then he proceeded to shew, that that interpretation of the act, whereby the estate was adjudged to vest in the offender, was *first*, more safe; *secondly*, more consonant to the rules of law; and *thirdly*, would more effectually promote the design of the act.

1st more safe; because if the ancestor does not take, the act is altogether silent who shall. Besides, as the legislators did not intend to restrain the offender absolutely from purchasing; for (in his opinion) he might purchase for his heirs to enjoy after him, but not to retain: So by a parity of reason, the law makers did not intend to restrain him from taking by descent, for * the benefit of his issue; but * P. 364. only from taking to retain for his own benefit.

He urged, that their interpretation created a difference never thought of by the law makers, as to the time, when the descent happens; viz. if it happens before the conformity of the offender, then with respect to that estate, his conformity (according to them) shall not at all avail him; but if it happen after conformity, then he shall take.

The act of parliament would most certainly have provided for the reversioner, if they designed it should go over to him.

As to what was said concerning the regard the law paid to the certainty of a freehold, and that it should not be in abeyance, save in cases of absolute necessity, he allowed *that* to be law, but thought it made entirely for him; because unless the estate did vest in the ancestor, there could be no tenant to the *præcipe*.

He observed, that this came to be a question after the death of the offender, who, during his life, had always been esteemed to have a good title, and forty years after the offence committed: That a writ of *Dower* had been brought against the ancestor, and judgment against him in that action; and this judgment confirmed in parliament, which could not have been, unless he had been a good tenant to the *præcipe*.

That unless this interpretation prevailed, and the estate allowed to vest in the offender, many marriage settlements and purchases would be overturned; and multitudes of lessees, all claiming under this offender, must unavoidably be ruined. Upon these accounts, he concluded his construction of the statute, to be the most safe.

2^{dly}, He argued, that this construction was most consonant to the rules of common law, where no particular direction is given, how the estate should go; for there the law always throws it upon the king.

* And where can this power be lodged safer than in the crown? * P. 365. Who so zealous and able to put the law in execution? *tutissima est* Maxim. *custodia quæ sibi creditur*.

Thus in outlawries, attainders for treason or felony, the offender may take for the benefit of the crown.

Hilary Term 3 Geo. I.

3^{dly}, This interpretation will more effectually promote the end and design of the law.

This is not, as is pretended by the other side, a lessening of the penalty. The profits of the land is both in law and reason the land itself. *Co. Lit.* 4. *b.* And he who is excluded from taking the profits, is excluded from the land, as to all purposes of profit and advantage for himself.

According to the interpretation they would put upon the act, it may so happen, that a Roman Catholick, only thro' the misfortune of a foreign education, may be excluded, to make way for a rigid papist bred at home.

Then he argued, that this offence being pardoned by stat. 2 *W. & M. cap.* 10. *A. D.* 1690. the disability was so *ex consequenti*; and that this pardon coming out before the time of the descent, was equivalent to a conformity. 3 *Lev.* 331, 332.

But it may be objected, that this is a fact not found in the special verdict.

To which he answered, that this act being a general law, the court must *ex officio* take notice of it. And had the offender not been included in the act, it would have been incumbent upon the other side, to shew that he was excepted out of the pardon. 1 *Levinz* 26, 88.

Then he argued from a clause in the 2^d of *William and Mary*, wherein it is expressly provided, that that act of parliament should be taken notice of in evidence, without pleading, that by a parity of reason, the court ought to take notice of it, though not found by verdict.

* P. 366. * Then by a nice and minute observation of the difference between the two acts of *primo Jacobi*, and *tertio Caroli*, he shewed, that tho' the former was not repealed by the latter, yet it was strengthened, enlarged and explained by it.

Then he insisted, that the estate-tail, subsisting unspent, it could not go over to him in reversion.

Philip in judgment and consideration of law, may have issue as long as he lives. Nay, he further insisted, that he might have issue at the time of the descent: Nay, that it must be supposed, that he has issue now alive; that had the case been otherwise, the contrary should have appeared in the special verdict.

Notwithstanding the endeavours of the counsel of the other side, he said it still remained a doubt, how in case the estate is to go over to the reversioner, by what rules of law the estate can be brought back again, for the sake of the offender, (in case of conformity) of for the issue.

Ant. 360. The case of *Fitzberbert Mortdaunc*. 47. a hard case, and not law now.

As

Hilary Term 3 Geo. I.

As to the case put of a disseisor dying without heir : That case Ant. 362. proves no more, than that as long as the tortious estate did subsist, so long (and longer in the nature of the thing were impossible,) the Lord had a right.

But no case has yet been cited, where the entry of him in remainder or reversion, had been held lawful, the estate-tail subsisting and remaining unspent.

The vesting and re-vesting of estates, a thing not at all favoured in law.

He acknowledged, that in 1 *Co. Rep.* 87. it is held, that a grant of a rent *de novo*, to cease during the minority of the heir of the grantee, was good, and would cease accordingly.

* But to this he answered, 1st, That this does not hold in case of * P. 367. a grant of rent *in esse*.

2^{dly}, That the estate in the rent itself did not cease ; but the estate was only exonerated in point of render, and not of vesting.

In 23 *Edw.* 3. 19. (the same case with *that* just mentioned in *Co. Rep.*) it appears, that the wife of the grantee did recover the rent in a writ of dower, with a *cesset executio*, during the minority of the heir ; and that judgment was affirmed in parliament, which could not have been, if it had ceased intirely.

Hobart 346. Tenant in tail attainted of treason, and resolved, that it worked no corruption of blood, because *that* would have produced a *cesset* of the estate-tail, by which means the estate would have been taken from the king, and gone to him in the reversion, which the act did not intend.

This reason will hold here, for the heir cannot take by descent, where the ancestor did not take ; for the ancestor is the root from whence the inheritance must be derived.

That the donee died without issue of his body, necessary words in all *formedons* ; which is a plain proof, that a *formedon* will not lie, but upon the death of the donee without issue.

If a monk had issue at the time of his profession, he in the remainder cannot bring a *formedon*. If the dutchess had brought her *formedon*, the life of *Philip* had been an unanswerable objection.

Adjournatur. Vide post. Trin. 4 Geo. 1.

Cook and Dutcheffs of Hamilton: B. R.

THIS was a writ of error upon a judgment in the court of * P. 368. common pleas. The court being about to give their opinion for the affirmance of the judgment, it was moved by the counsel for the plaintiff * in error, that the record was not removed ; there being a plain variance between the record described by the writ of error, and the record returned by the court of common pleas.

Writ of error.
Question,
Whether the
record was
removed ; by
reason of a
variance be-
tween the re-

cord described by the writ of error, and the record returned.

Hilary Term 3 Geo. H.

The case as to this point, stood thus.

The writ of error run thus, *Quia in recordo & processu etiam in redditione iudicii loquelæ quæ fuit in cur. nostra coram vobis & sociis vestris iustic. nostris de banco per breve nostrum inter J. S. and 31 defendants there named, error inter venit, &c.* And by the record returned it appeared, that the original action was between J. S. and the 31 defendants before named, and one defendant more; and that the verdict was likewise had against the 32 defendants; but that the 32^d defendant died before judgment, and that notice was taken by an entry upon the record of his death; and the judgment was given only against the 31 named in the writ of error.

This was urged, *1st*, to be a variance between the writ in the record described by the writ of error, and the writ in the record returned.

2^{dly}, It was insisted, that the offence or trespass mentioned in the writ of error, which was a trespass by 31 defendants, must be a different trespass from that in the record returned, which was a trespass by 32 defendants.

Lord chief justice *Parker* delivered the resolution of the court, to the following effect:

We are all of opinion, that this writ of error is well brought, and the record well removed, notwithstanding both these objections.

The first objection is capable of three answers.

1st, That the word *inter* does not refer to *breve*, but *loquelæ*. It is true, it may refer to either; so that the court will, since the rules of language will admit of it, refer it to that, which will uphold the writ of error. If there be a comma put between *per breve nostrum*, * and the word *inter*, then the word *inter* will plainly refer not to *breve* but *loquelæ*.

The word *breve*, only used to shew what way the suit was commenced, by writ or bill.

If the writ of error had been *sine brevi*, then it had been impossible, from the nature of the thing, that the word *inter* could refer to *breve*.

2^{dly}, Supposing the chief justice of the court of Common Pleas may be made by writ, as well as the chief justice of the King's Bench, then the words *per breve* may refer to the chief justice.

3^{dly}, When any one of the defendants die, it is no longer a writ against him; and then the case is all the same, as if he had never been named in the writ. To this purpose was quoted the case of *Oliver and Hunning, Trin. 13 Gulielmi*, where it was resolved, that an original writ was determined by outlawry; *a fortiori* it will be so in the present case by death?

An original writ is determined by death, or outlawry.

To

Hilary Term 3 Geol. 1.

To the 2d objection we answer, that the identity of the trespass, does not depend upon the number of the persons that committed it; for the trespass may be the same, be it committed by five or ten persons. And to this purpose the case of *Hunt and Rawson, Trin. 10 Gulielm* was relied upon, as being a case full in point.

The identity of a trespass does not depend upon the number of persons, said to have committed it.

A court of justice ought to endeavour expounding things so, that they may be brought to some end.

The judgment given in the court of C. B. was affirmed.

Woodright and Wright. B. R.

UPON a special verdict found by the jury, the case was shortly this. The testator devises the land in question to *Edward Basil* in tail; remainder to *Susannah Wright*, and the issue of her body lawfully begotten; remainder to the right heirs of *Edward Basil* for ever. *Edward Basil* dies without issue, in the life-time of the testator.

* P. 370.

Devise to A. in tail, remainder to B. and the issue of her body lawfully begotten; remainder to the right heirs of A. for ever. A. dies without issue, living the testator; B. after making of the

Susannah Wright some years after the making of the will, had issue *Margaret Wright* the defendant, who is found likewise to be heir at law to *Edward Basil*; and then *Susannah Wright* dies in the life-time of the testator.

The plaintiff's title was as heir at law to the testator.

will, had issue C. heir at law to A. and dies, living the testator. Resolved that the heir at-law to the testator, and not C. should have the land.

The question therefore was, whether *Margaret Wright* could claim any estate under this will, either as heir at law to *Edward Basil*, or as daughter to *Susannah Wright*?

The arguments in this case from the bar I did not hear; but the resolution of the court was by *Parker* chief justice delivered to the following substance.

The 1st point to be considered is, whether *Margaret Wright* is entitled to take by the will, as heir at law to *Edward Basil*, by virtue of these words, *the remainder to the right heirs of Edward Basil for ever*?

And here the question is singly this, Whether those words do make the heirs of *Edward Basil* devisees, and import any devise to them? So that the devise is not a lapsed legacy, by the death of *Edward Basil*, in the life-time of the testator. Or whether *Edward Basil* is not sole devisee? And those words only used to denote and describe the nature and the quality of that estate, which was hereby designed to be solely given to *Edward Basil*, viz. to speak in the language and idiom of law, whether these words are words of purchase or limitation?

Whether the words right heirs, &c. be words of limitation or purchase?

Hilary Term 3 Geo. 1.

The case of *Bret and Rigden in Plowd. Com.* must be most certainly, and was on all hands, allowed to be law.

* P. 371.

* The 2^d point *only* in that case, applicable to this; and that was shortly thus. The land was given to *Henry Bret* and his heirs; and *Henry* dies in the life-time of the testator; and the question was, Whether the son and heir of *Henry Bret* should take the land by this devise?

Manbood, who argued for the son and heir of *Henry*, urged most of those arguments, that have been now made use of from the bar, in favour of the defendant. He insisted, that the heir was included in the devise; and tho' perhaps the testator designed that he should take *mediante patre*, viz. by descent, yet this is but a circumstance relating to the manner of his taking: And therefore since by the act of God, it is impossible that this circumstance can be complied with, and necessary that the heir, if he takes at all, must take immediately, *That* is certainly the better and more preferable construction in case of a will, which supports the main end and design the testator chiefly aimed at, tho' it cannot the form and manner the testator designed that end should be brought about by; rather than *that* which overturns the substantial, as well as the circumstantial part of the testator's intention. And those cases were put, Land devised to *A.* for life, remainder to *B.* in tail; *A.* dies in the life-time of the devisor; *B.* shall take by the will an estate-tail in possession. — Land devised to the wife of *J. S.* *J. S.* dies; she marries *J. D.* and then the devisor dies; she shall have the land. And yet the testator designed in the first case, that *B.* should take an estate-tail in reversion; and in the second, that the wife of *J. S.* should have the land: But this being impossible, it was resolved, that *B.* should take an estate-tail in possession; and that the wife of *J. D.* should have the land; in order to preserve the substance of the will, when it was impossible to observe the formality.

* P. 372.

But for all this it was resolved, that the heir of *Henry Bret* could not take. For as in all grants, there must be a grantor and grantee; at the time when the * grant is to take effect; so by parity of reason, in case of a will, there must be in being a devisee at the time of the death of the testator; *that* being the time, when by law, a will is to take effect.

And as to what was said, that heirs were named in the devise; it was resolved, that those words *his heirs*, were inserted only to limit and set out what sort of estate the devisor intended *Henry* should take by the will, viz. a fee simple; and that consequently those words were put in as well to enable *Henry* to give away the land from his issue, as to let it descend to his issue. That the descent to the issue, was but a consequence in law, of a fee-simple first vested in *Henry*; and what lay entirely in the breast of *Henry*, whether he would permit it to be so, or not.

That it was not a good way of reasoning, That because the land would have descended to the heir of *Henry*, if it had vested in the father

Hilary Term 3 Geo. I.

father first, therefore the heir shall take immediately, tho' the father died in the life-time of the devisor; for then by a parity of reason, if *Henry* had died in the life-time of the devisor without heirs, the Lord would have had the land by escheat, and the wife of *Henry* must be intitled to dower.

This case then being undoubtedly law, and so allowed to be on all hands; the next thing to be done, is to see, whether the present case can be distinguished from it.

The difference assigned is this, that the devise is not here as in *Plowden*, a devise to *Edward Basil* and his heirs; but a devise to *Edward Basil* in tail, remainder to *Susannah Wright* and the issue of her body lawfully begotten, remainder to the right heirs of *Edward Basil* for ever. So that between the devise to *Edward Basil* in tail, and the devise to the right heirs of *Edward Basil* for ever, there intervenes an intire estate, viz. that to *Susannah Wright*, &c.

* But to this I answer, that this difference produces no other effect, * P. 373. than a diminishing or lessening of the estate in fee-simple in point of value, that is by these words of the will to be conveyed to *Edward Basil*, by carving an estate-tail out of it.

So that the only difference on this account, between the case in *Plowden* and the present case, is only this, that in *Plowden*, *Henry Bret* was to have taken a fee-simple in possession; here *Edward Basil* was to take a fee-simple in reversion.

Littleton Sect. 578 (with the comment of Lord Coke, Co. Litt. 319) it is held, that if an estate be limited to the ancestor for term of life, remainder to B. in tail, remainder to the right heirs of the ancestor, the words *right heirs* are words of limitation, and not of purchase; as well as if the estate had been limited immediately to the ancestor and his right heirs, without intervening of the estate-tail in remainder.

This is the very same case with that before us; except that the case of *Littleton* is the case of a grant, and this before us is the case of a will, which as to this point makes no difference at all.

If *Edward Basil* had survived, no body can say, but that the fee would have vested in him, and in him alone; he would then have had the entire power over the estate, and the descent to his heir would then have appeared plainly to have been but a consequence of the fee vested in him, and which at his pleasure he might permit or prevent.

It is not his living to take the freehold, that does as it were accidentally turn these words into words of limitation; but because these are in their own nature, and in all events, words of limitation, therefore it becomes necessary that the ancestor must take, or no body.

So that upon the whole, these words, tho' they may, perhaps, carry something in their sound, that looks like a design and intention in the testator of favour towards the heirs, in reality are not so;

Hilary Term 3 Geo. II

* P. 374. but serve only * to describe the estate which passes to the devisee, and for his benefit only. And then it comes out to be the same point intirely with *that* resolved in the case of *Bret and Rigden*. 1)

2d point.

It being clear then, that the defendant can take nothing by this devise, as heir at law to *Edward Basil*; the next point to be considered is, Whether she can take any thing as daughter to *Susannah Wright*, by virtue of that clause in the will, *remainder to Susannah Wright and the issue of her body lawfully begotten*?

In speaking to this point, it will be necessary to see, 1st, Whether she can have any right, supposing the words *issue of her body*, be looked upon as a synonymous expression to the heirs of her body?

And 2^{dly}, Whether supposing she has no right this way, she can derive any right, by any other interpretation, which the word *issue* is capable of?

As to the first, the case differs not from *that* of *Bret and Rigden*; saving that *there* a fee is devised, and here an estate-tail, which will make no difference in the interpretation before us; for if here the words *heirs of her body* are not words of purchase but limitation, the point comes out just the same. For supposing *Susannah Wright* had lived, she and the only would have taken by this devise; and she would have had a power of barring the issue by fine. (I speak not now of common recoveries; because tho' there the issue is barred, yet in consideration of law, he is recompensed by a judgment to recover over.) And here again by the same reason that the daughter of *Susannah* should take, the husband must be tenant by curtesy, which they for the defendant will not say is law. In short, the only difference that there is between a devise in fee, and in tail, is this, that in the former case, the devisee has a greater choice and variety of ways, whereby he may defeat the issue, than in the latter. But the words to the *heirs of the body* are as much words of limitation, and as * proper to express an estate-tail, as the word *heirs* is to express a fee. And the words in both, do not really import, any design of favour to the heirs, but the devisee only; and so much the rather in the case of an estate-tail, because it is a known and a common method, where the testator or grantor has a concern or regard for the issue, to make the ancestor tenant for life only; and by that means, tie up the hands of the ancestor, from doing any thing to the prejudice of his issue.

Sta. de Donis.

It cannot be denied to have been the principal design of the makers of the statute *de Donis*, to secure the estate to the issue, and restrain the ancestor from conveying the estate from the issue; and therefore admitting, but not granting that this devise, in those times, when that statute reigned in full force, would have imported a devise as much to the issue as ancestor; since the one was as certain to take by the devise, in due time, as the other; yet would it not be so now, after that

Hilary Term 3 Geo. II.

that statute is so much altered by subsequent statutes, or judgments of courts of law, whereby the ancestor has it now in his power by fine, &c. (I speak not of common recoveries for the reason before given.)

To shake the law when firmly established, is not to be done, without the greatest danger to the estates and properties of the subject. And I must have thought myself obliged to have submitted to the number and weight of authorities, tho' I had not been satisfied with the reasons upon which they were established.

This doctrine established in the case of *Bret and Rigden*, remained uncontroverted until *Hartop's case*, 33 *El. Cro.* 344, when it received a new sanction.

So likewise it was again established in the case of *Fuller and Fuller*, reported *Moore* 353. and 3 *Cro.* 422. And tho' it is said, that two judges differed in their opinion; yet upon a narrower inspection it does appear, that those very judges, that did dissent, have by the reasons they gave for their dissent, confirmed the * law now in question. * P. 376; For they were of opinion, that the devisees might take as purchasers, but not by the first devise; but by virtue of the new publication, which did in their opinion amount to a new will.

And now I come to consider 2dly, Whether the defendant can put any other construction upon the word *issue*, by virtue of which she may claim under this devise.

In the case of *King and Melling*, 1 *Ventris* 229. the word *issue*, Import of the is by Lord *Hale* affirmed to be *nomen collectivum*, and takes in the word *issue*. whole generation; and is therefore a great deal stronger than the word *children*. It is there observed, that in all acts of parliament, the word *issue* is as comprehensive, as *heirs of the body*; as in the statute *de Donis*, and the stat. 34 *H. 8.* of *entails* settled by the crown.

Tyler's case, 34 *Eliz. B. R.* may serve to shew the difference, between the words *issue* and *children*. *Tyler* had issue *A. B. C. D.* and devises to his wife for life, after her death to *B.* his son in tail, and if he die without issue, then to his own children; *A.* had issue a son and died, and *B.* died without issue; resolved, that the son of *A.* should not take as one of the children of the testator.—Yet in *Wild's case*, 6 *Co.* 17. it is admitted, that if the devise had been to the children of the bodies, it would have been an estate-tail; *a fortiori*, if it had been, as in our case, the issue of their bodies lawfully begotten; because issue is, *ex vi termini*, *nomen collectivum*, which children singly is not, tho' by other additional words it may become so.

The case itself in *Wild's case* was only this, that if a devise be made to a man, and after his death to his children, or his issue; and he has issue at the time of his death, the issue shall take by way of remainder.

Upon

Hilary Term 3 Geo. I.

Upon the whole it does appear, that these words are words of limitation, and do most certainly in a * will give an estate-tail; and then the point comes out just the same.

If the deviser had died just after the making the will, it is plain, that *Susannab* would have taken an estate-tail.

If it be objected, that the estate-tail results from an operation of law, that the testator designed 1st, an estate to the devisee, then an estate to the heir; and that it is the law that conjoins them, and creates an estate-tail out of both. I answer, that the law creates an estate-tail, purely to uphold and preserve the intention of the testator, which would be often destroyed and defeated, if the children of the devisee, that were in being, either at the time when the will was made, or at the time when the will takes place, viz. the death of the testator, were to be considered as so many distinct devisees. For example, suppose an estate devised to *B.* and the issue of his body lawfully begotten, remainder to *C. &c.* If *B.* has issue at the time of the death of the testator, *J. N.* and after the death of the testator has issue *J. S.* According to this notion, if *J. N.* dies without issue, the estate will go to the remainder man, and not to *J. S.* which was most certainly the intention of the testator. And other cases might be put of the same nature; so that taking by limitation, and taking by purchase, is not a meer notion and way of thinking; but will in reality often let in other persons to take, than what the testator designed, and in effect amounts to the making a new will.

The supposition of kindness in the testator for the issue, too precarious and slender a foundation to build upon; and generally speaking, the devisee is the only person, out of kindness to whom the devise was made; especially it seems to have been so here, where the issue was born several years after the making the will, and consequently could not be thought upon by the deviser.

* P. 378. * The beginning of the will, whereby *Edward Basil* is by general words constituted heir of all, (tho' how he was so is explained by the subsequent clauses of the will) pleads strongly, that the devise was not out of pure kindness to the issue.

The danger of this construction none; for upon supposition, that the deviser intends a favour to the issue, he has it still in his power during his life to alter his will accordingly. So that the only consequence of this construction is, that it will oblige men upon the death of their devisees, to do what is certainly prudent and proper to do, viz. reconsider their wills.

Judgment *pro quer'.*

Queen

Hilary Term 3 Geo. 1.

Queen and Simpson. B. R. See Ant. 248, 341.

THIS was a conviction before justices of the peace, upon the statute of 3 & 4 W. & M. cap. 10. for deer stealing. These convictions (for there were two or more of them) being removed by *certiorari* into the King's Bench, exceptions were taken to them, which were argued several times. And now chief justice *Parker* gave the resolution of the whole court, to the following effect.

The great objection against these convictions is, that the justices of the peace have no authority to proceed against the party, and convict him of the offence, in his absence.

As to this matter we are all of opinion, that the conviction is a good conviction, tho' taken in the absence of the party.

And here it is to be observed, that the statute does not give the justices any particular direction, or prescribe any particular form, to be observed in the convictions before them; all that the statute requires is, that this conviction be by oath of one credible witness.

* So that the justices are not obliged to the observance of any rules, unless those of natural justice, which all men are bound to observe. One of those rules I readily own is, that the offender should be heard before he be condemned. But this rule must admit of this limitation, *viz.* unless the party refuses to appear. For as it would be unjust not to require the justices to summon the party, and give him notice to appear and make his defence; so to require more from the justices, would be to put it in the power of the offender, to elude justice, and render his conviction impossible, by wilfully absenting himself.

As to the manner how this notice is to be given, the act being altogether silent; we must recur to natural justice, which only requires the party should know, when and where he is to appear and make his defence; and if he will then neither appear himself, nor trust his defence to any body else, it is highly reasonable he should be proceeded against; and not reap an advantage from a wilful and criminal absence.

But it is objected, that statutes are best expounded by rules of common law; and that it is more agreeable to the forms observed by the common law, not to convict the party in his absence.

I readily admit the rule laid down by them, that statutes are best expounded by rules of common law in like cases; and will therefore examine, how the common law proceeds in criminal cases, where the party refuses to appear.

And first in case of outlawry for treason or felony, the law interprets his absence, as a sufficient evidence of his guilt; and without requiring further proof or satisfaction, the law accounts him guilty of the fact; corruption of blood, and forfeiture of estate ensues.

VOL. X.

U u u

In

The question in this case was, whether upon stat. of 3 & 4 W. & M. cap. 10. Justices of peace might convict the offender in his absence, upon his default to appear, being duly summoned, Court of opinion they might.

Statutes best expounded by rules of common law.

Outlawry for treason or felony.

* P. 379.

Hilary Term 3 Geo. I.

Real actions. In real actions the 2d default is final and conclusive ; and the court without regarding the merits of the cause, will give judgment that he shall lose his land.

* P. 380. **Outlawry for lesser crimes.** * Outlawry in lesser crimes, or in personal actions, does not, as in the first case, in judgment of law, occasion the party to be looked upon as guilty of the fact ; or as in the second case, occasion a judgment for the thing in demand ; but is yet in its consequences more penal and fatal than if it did.

For a restraint of the liberty of the party if he can be found, the profits of the land while the outlawry remains in force, and all his goods and chattels forfeited to the king, together with an exclusion from the benefit and protection of the law follow upon it.

But it will be said, that for all these proceedings, the law has prescribed and directed all the forms and circumstances necessary to be observed in them.

I proceed therefore to proceedings of a more summary nature ; and consequently more resembling the case before us.

Common counsel-man. The office of common counsel-man, is in law accounted a freehold ; and yet no body will say, but a man may be amoved from it in his absence.

Practice of courts of law. To come now to proceedings in our own courts. Is it not our daily practice to set aside judgments irregularly obtained, grant attachments, &c. in absence of the parties ?

Notice indeed must be given ; but if the party will not appear, the court proceeds without seeing or hearing.

It is observable, that in some of the cases put before, the law proceeds to condemn the party not only in his absence, but for his absence ; or which is all one, esteems his absence so strong an argument of guilt, that further proof is esteemed superfluous.

Whereas here the justices only proceed to examine, whether the charge be true ; and do not condemn the offender, but on proof by oath.

* P. 381. * The case before us, is like to the award of a writ of inquiry upon default, by common law.

In many summary proceedings, there is no power given to oblige the party to appear ; and that is the case here ; there is no express words in the act by which it is given.

By implication it cannot be given, unless it were of absolute necessity to the doing of justice ; which I have shewn it is not.

If this doctrine were true, it would follow that a member of a corporation, might be arrested, in order to compel him to appear.

By this rule the party must appear, tho' he think fit to confess the fact, and pay the penalty.

If

Hilary Term 3 Geo. I.

If courts of law, that are armed with a coercive power, to bring the party in, do not in the cases I have before mentioned, think themselves obliged, from the nature of the thing, to use this power; certainly we cannot expect it from justices of peace, who really are destitute of this power.

Besides, I cannot see, to what purpose, this appearance before the justices is required. For when the party is before them, can they oblige him to make his defence? No, unless he pleases; and if he had pleased, he might have appeared without force; and yet the only end of his coming before them, is in order to make his defence.

Lastly, the objection of not being forced to appear, cannot be made by the party; because if it be an error, it is one in favour of him that makes the objection; for this would be contrary to the general rule of law in other cases. Rule of law.

But it is objected, that the summons is faulty; for it ought to appoint a particular hour of the day, place, &c.

To this I answer, that as to this, the record stands thus; *Licet summonitus, &c. ad hoc tempus, et hunc locum, * defaultam fecit.* Now P. 382. this in strictness does necessarily import, that the summons was to appear upon that very spot as to place, and that very instant as to time, where and when the justices were assembled; otherwise it could not have been a default. And what the justices have returned, must by us be accounted true in every particular.

But it is objected, that these sorts of records are, as is very well known, not made up by the justices, according to the truth of the fact; but drawn up by advice of counsel, so as to obviate all the objections that may be made against them. To this it must be answered, that we ought to give credit to the justices of peace, in the execution of that power, the law has intrusted them with; and that if the justices should make a false return, whereby the party and justice are abused, they may be punished.

The convictions adjudged good.

King and Hammond. B. R.

THIS case had formerly been argued; and now chief justice Chimin.
Parker gave the resolution of the court. Stra. 44.

The objections taken to this indictment two; 1st, That the place where the nuisance was laid to be committed, was uncertainly alledged; for said to be *in communi strata five alta regia via.*

To this the answer is, that the words *communis strata*, and *regia via*, are synonymous expressions, and signify the same thing. The proper signification of the word *strata* signifies a paved way; but Highway.
now

Hilary Term 3 Geo. 1.

now the word is used in a more general sense; and for this purpose several authorities both ancient and modern were quoted.

A navigable river esteemed a highway, *Fitzherbert* 279. *Tit. Challenge.*

* P. 383. * 2d objection is, that it was not set forth from what place to what place the highway led, in which the nuisance was said to be committed.

Respondetur. Latch 183. A highway has no *terminus a quo*, nor *terminus ad quem*. 3 *Keble* 89. *King and Thompson*, 10 *Gulielmi*, a highway infinite.

Indictment good.

Smith and Parks. B. R.

8 Mod. 345.
In ejectment
for non-pay-
ment of rent,
upon bring-
ing in the ar-
rears of rent
with costs,
rule granted
to stay pro-
ceedings.

A LEASE being in strictness forfeited by non-payment of rent, the lessor brings an ejectment. The lessee by bringing into court what was due for arrears of rent with costs, &c. obtained a rule to stay proceedings upon the ejectment. The lessor moves the court to discharge the rule, unless the defendant would give security for the payment of rent, upon an affidavit that the defendant was a soldier, and so by law intitled to a protection.

1 Mod. cases in law and equity 343.

Maxim.
Upon affida-
vit that the
defendant
was a soldier,
and conse-
quently a pri-
vileged per-
son, he was
ordered to give security for the future payment of his rent.

Court. If you will have equity you must do equity; if by the equity of the court, the plaintiff loses the benefit of the forfeiture of the lease the law gives him; but reasonable, that he should have security for the payment of rent; especially when it appears upon oath, that the defendant is such a person, as is by law privileged from payment of his debts.

ordered to give security for the future payment of his rent.

Chaplain and Southgate. B. R.

Covenant for
quiet posses-
sion.

* P. 384. THIS was an action of covenant. And the case was this, The defendant leased to the plaintiff a farm called *Dale*; and there being a pretence of a right of common set up to two closes, comprehended in the lease, the lessor covenants with the lessee, that he shall quietly enjoy the said two closes, against all claiming, or pretending to claim any right in them. Upon this covenant, the lessee brings his action, and assigns his breach thus, That such a one having, or pretending to have a claim time out of mind, did enter upon the said closes.

Hilary Term 3 Geo. I.

To this the defendant demurs; and it was insisted upon by the defendant's counsel, that the covenant extended only to legal not tortious claims; and therefore that the plaintiff should have set forth, that the claim of him that disturbed him was a legal one. 2 Cro. 315. *Vaughan's Reports* 119, 120, *Bickerstaff's case*.

But the court were of opinion, that the words of the covenant did extend to all interruptions whatsoever; and so was the plain intent and meaning of the parties; for if it was to extend to legal claims only, then would the tenant be put under the hardship of trying the right for the landlord; which was the very thing the tenant plainly designed to prevent by this covenant.

This case very different from the case of *Kirby and Hansacre*; for there it did not appear, but the disturber might claim even under the lessee himself; but this impossible here, by reason of those words, *Time out of mind*.

Breach well assigned. Judgment *pro quer'*.

Savil & ux' ver. Kirby. B. R.

THE spiritual court had proceeded against the defendant, for these words spoken against the wife, *you are a bawd*. The defendant moved for a prohibition, suggesting that these words were spoken at *Westminster*, and that the city of *Westminster* is an ancient city, and that there is an ancient custom within the * said city, that whores should be punished by imprisonment.

Action for words in spiritual court.

Motion for a prohibition.

* P. 385.

Cause shewn against granting a prohibition.

Maxim.

Suggesting likewise, that an action had been brought for these words, in the Marshal's court, and verdict and judgment for the plaintiff; and that *nemo bis pro eodem delicto*, &c. That this matter had been pleaded in the spiritual court; but that notwithstanding they had proceeded to sentence.

A rule was made to shew cause why, &c. And now Dr. *Andrews* a civilian, and Mr. *Nicholls* came and shewed cause upon that rule.

The substance of their arguments were, that bawds were by the spiritual law accounted infamous, and their evidence rejected in all cases. That there had been a distinction taken between these words, *you keep a bawdy-house*, and *you are a bawd*. That the former words might be punishable in the temporal court, by indictment, as importing a breach of the peace; but that the latter were punishable in the spiritual court only.

Salk. 552.

A multitude of cases were quoted to prove that an action does not lie in the temporal courts for such sort of words, as *whore*, *bawd*, &c. viz. *Fitzherbert N. B.* 51. 2 *Roll. Abr.* 296. pl. 13, 16. 2

VOL. X.

X x x

Rolle's

Trinity Term 3 Geo. I.

Rolle's Abr. 301. pl. 12. 5 Co. 31. a. 1 *Rolle's Abr.* 295. pl. 12. Cro. Jac. 327. Cro. Eliz. 582. Carter 55. 1 Ventris 220. 2 Keble 612. Raym. 115.

Then it was argued, that admitting these words were actionable at common law, either so in themselves, or accidentally so, by reason of some temporal damage sustained by the words, yet this would not oust the spiritual court of their jurisdiction; for that both courts might have a concurrent jurisdiction of the same cause, where they proceed *diverso intuitu*, which was the case here; for the process in the spiritual court was *pro salute animæ et reformatione morum*, that

* P. 386. in the * temporal court for reparation in damages; and for this purpose the following instances were given.

Salk. 552. Recovery by husband in a temporal court of damages against the adulterer, no bar to a prosecution in the spiritual court at the promotion of the husband.

The statutes prohibiting under certain penalties the clergy to marry without licence, non-residence and farming, do not oust the jurisdiction of the spiritual court.

In the act of uniformity 1 Eliz. and the late act for preventing of schism, there are special proviso's, that the parties shall not be prosecuted in both courts, and *exceptio probat regulam in rebus non exceptis*.

Maxim. The same will often proved in both courts, viz. temporal and spiritual; because the proof in the one court, establishes it for lands, the other for chattels only.

Register, fol. 15, laid down as a general rule, that if the principal belongs to the spiritual court, the accessory must be tried there too.

Common in temporal courts, in case of the battery of a servant, for different actions to be brought for the same battery; the one by the master, the other by the servant. Damages to be recovered in both; and yet recovery in the one, not to be pleaded in bar of the other.

It was argued, that the party by standing out thus until sentence, and then moving for a prohibition, did overturn the proceedings in the spiritual court, and hinder the bringing of an appeal, which by the statute of Hen. 8. must be brought within fifteen days after sentence.

It was likewise insisted upon, that tho' it was pleaded, that there was a prosecution in the Marshal's court, for the same words; yet it was not said for the same words spoken at the same time, without which the plea can signify nothing.

* P. 387. * An objection was also taken to the suggestion, viz. that the wife only prayed to have the prohibition: For tho' by the practice of the spiritual court, a feme-covert may sue singly; yet in the temporal court, both husband and wife ought certainly to join in praying for a prohibition.

Trinity Term 3 Geo. I.

As to the custom in *Westminster* it was said, that this was only matter of suggestion in this court, without any affidavit, and never laid by plea before the court.

That besides, there was nothing more pretended in the custom, than what generally obtains all over *England*, viz. that such sort of persons are generally sent to a house of correction.

The rule was discharged.

* Trinity Term

• P. 388.

3 Geo. I. B. R.

Parishes of South Sidenham and Lamerton.

THE question was about the settlement of one *Wills* and his wife, that were removed by an order of the justices, from the parish of *Lamerton* to that of *South Sidenham*.

Settlement;
Stra. 57.
If a person
has two set-
tlements, he
is settled
where he
lives.

This order was now quashed by *B. R.* where it was resolved, that if a man should have two settlements, he is to be esteemed as settled there where he lives. And tho' it was at his election to settle himself in each place; yet it was not in the power of the justices, to remove him from the place where he lives, and has a right of settlement, to another place where he has likewise a right of settlement. So that admitting, there was a settlement at *South Sidenham*; yet if there was a settlement in *Lamerton*, the place where he resided, the order of the justices to remove him must be quashed.

Whether

Trinity Term 3 Geo. I.

* P. 389. * Whether he had gained a settlement at *South Sidenham* depended upon this question, Whether *Wills* having by law, a right to take out administration, and a right to the surplus of the estate (debts and funeral expences paid) of a person possessed of such a term, as would in law intitle a man to a settlement, within the statute of *Car. 2.* had, before administration actually taken out, such an equitable interest, as would in law amount to a settlement? But this question being immaterial, by reason the court held him settled at *Lamerton*, the court gave no opinion in it.

Whether such a right of administering, &c. as would entitle to a settlement, within the stat. of *Car. 2.* shall be deemed a settlement before administration actually taken out?

As to *Lamerton* the case stood thus :

Wills takes a lease of an intire tenement, for the term of 60 years, if he and his wife and the lessor should live so long, rent 13 *l.* 10 *s.* per annum.

House and land of 9 *l.* 10 *s.* per annum in one parish; and 4 *l.* per ann. rent in another parish, Settlement in the parish where the house is, in case the whole is one entire tenement.

It was likewise stated in the order, that so much of this tenement as amounted to 4 *l.* per annum was situate in *South Sidenham*, and but 9 *l.* 10 *s.* per annum, with the house in *Lamerton*. And whether this was a settlement within the stat. of 13 & 14 *Car. 2.* was the question?

The court was clearly of opinion, that it was.

They observed 1st, that the words of the statute were, a tenement of the value of 10 *l.* per annum; so that the rent was not at all material.

2^{dly}, It was observed, that the statute says, a tenement of the value of 10 *l.* per annum, and does not say that all the tenement must be in the parish where he lives.

So that this case is a settlement, within the words and letter of the act; and as it is within the letter, so it is within the intention and reason of the act too.

For the plain reason of the law is this, that it is not probable that a person should become chargeable, who has so much credit, as to be intrusted with the management of a farm of the value of 10 *l.* per annum.

* P. 390. * Indeed, if a man takes several distinct tenements in several parishes, and both or all of them amount to 10 *l.* this will not make a settlement; but here the tenement was one entire and distinct tenement.

Service for a year; and hiring for a year, tho' but half the year's service be subsequent to the hiring, make a settlement.

Ant. 287.

This case was by judge *Eyre* compared to the case, where a man serves half a year, then is hired for a year, and serves only half that year; which is a settlement within the words and meaning of the act. The words are satisfied by the hiring for a year, and service for a year; and the meaning is also satisfied, because a person of that strength, as to be hired for a year's service, was not esteemed by the act a person likely to become chargeable, but able to maintain himself by his bodily labour.

Trinity Term 3 Geo. I.

Hewet and Bainard. B. R.

WRIT of error brought of a judgment in the court of common pleas.

The single question was, whether a juror, that was withdrawn from the panel by the consent of both parties, to the intent that the trial might for that time go off *pro defectu juratorum*, may not be of the jury, when the cause comes to be tried at a subsequent time; and if he be, whether *that* will be error.

Resolved, that a juror withdrawn from the panel by consent of both parties, in order that the trial might go off *pro defectu juratorum*, may be of the jury when the cause comes on again.

It was insisted, that it would be error; and that a juror withdrawn from the panel, was for ever after incapable to try the cause. And a case in 3 Cro. 430. was much relied upon, which was, that if a juror who had been once challenged, and the challenge allowed of by the court, should after try the cause, it would be error.

To this it was answered, that the case cited, was vastly different from the case at bar. For the case in 3 Cro. is the case of a person, challenged by one of the parties, as not standing indifferent to both sides; and * this challenge allowed of by the court, which amounts to a kind of judgment; and therefore as long as it stood, tho' the cause upon which that challenge was founded, ceased, the person was incapable to try the cause. Whereas here the juror is withdrawn from the panel by consent of both sides, for no other reason, but that the cause may be put off *pro defectu juratorum*: And therefore a person so withdrawn to be considered, as if he had never been returned; and consequently no more unfit to try the cause than any other.

Econtra.

* P. 391.

The case in *Hill. 25 Edw. 3. Fitzherbert 121. Title Challenge*, was quoted, where after a challenge to the array, for the partiality of the sheriff, the very same jury was returned by the coroner, and allowed to be well. Which case, in the reason of it, was said to be stronger than *this*; because tho' a challenge to the array, be upon account of partiality in the returning officer, yet it is upon the consideration the law has, that partiality in the returning officer will produce a partial jury. Whereas *here*, upon the whole record, there is nothing that casts the least reflection or imputation of partiality upon the juror; nothing that hinders him from being *talis*, &c.

If this be error, it would certainly be a good cause of challenge; and yet it is neither a principal challenge, nor to the favour. *Co. Inst. 157. b.*

As to the objection, That it shall now be presumed, that there was a good reason for his being withdrawn from the jury, and agreed so

VOL. X.

Y y y

by

Trinity Term 3 Geo. I.

by both sides, tho' the same does not at present appear: It was answered, That the reason why he was withdrawn does appear upon record; and such a reason as does not at all impeach him of partiality, viz. The reason was, that it being necessary for the jury to have a view, this man happening to be the last upon the panel was withdrawn, that so the cause might be put off *pro defectu juratorum*.

The court were clear in their opinion, that this man's trying the cause was no error.

Judgment was affirmed.

* P. 392. * *Parishes of Horton and—in Com.—*

Settlement.

THE case as stated upon the order, was thus:

A servant was hired for eleven months, and then he goes home with his cloaths to his father for a week; afterwards he is hired by the same person for eleven months more, then goes home for a week; and so, &c.

The question was, Whether this was a settlement?

Against the settlement.

And it was insisted upon, that it was not.

It appeared by several resolutions, that there must be a service for a year, and a hiring for a year.

Vid. Salk. 535.

In *Dunsfold and Ridgwick, Mich. 9 Annæ*, held, there must be a hiring for a year, as well as service for a year.

Ant. 287.

In the case of *Overton and Steepleton*, a servant was hired for half a year, service accordingly; then he is hired for a year, and serves half a year: Here tho' it was resolved, that this was a settlement, notwithstanding the service was not subsequent to the hiring; yet still it was held necessary, that there should be a service for a year, and a hiring for a year.

See the case page 293.

In the case of *Frencham and Pepperbarrow*, a servant was hired from the 3d of October to Michaelmas, three days short of a year; and then by agreement, he stayed as many days longer as completed the year. Held to be no settlement.

For the settlement.

On the other side it was said, that if this be no settlement, the act of parliament is eluded; and there will be no more settlements in this parish by virtue of it. That the fraud was very apparent from the circumstances of the case; and that it is a rule in pleading, that nothing needs be averred, that appears sufficiently without.

Maxim.

* P. 393.

Ant. 390.

* That the reason upon which this act of parliament was founded, was, that a person of that bodily strength, as that any person shall think fit to hire him for a year, is not such a person the law presumes likely to become chargeable. Besides, some regard was to be had to

ser-

Michaelmas Term 3 Geo. 1.

servants that they should gain a settlement, and not be hurried from place to place.

And of this opinion was chief justice *Parker*.

Contra, judge *Pratt*: The law must now be taken, that a hiring for a year, as well as service for a year is necessary.

I see not, but that if this agreement was made purposely, by way of caution to prevent a charge upon the parish, the intent was lawful, and we have nothing to do with it.

Besides, we cannot judge of fraud; *that* belongs to the justices. We cannot adjudge, that a demand and a refusal amount to a conversion, tho a jury may and will. *Adjournatur*.

* Michaelmas Term

* P. 394.

4 Geo. 1. B. R.

Parks and Crawford.

THIS was an action of escape, brought against the Marshal of the King's Bench, upon the statute of 8 & 9 *Gulielmi*, cap. 27. sect. 9. The words of which statute are, *That if the marshal or warden for the time being, or their respective deputies, shall after one day's notice in writing, given for that purpose, refuse to shew any prisoner, committed in execution, to the creditor at whose suit such prisoner was committed, or to his attorney, every such refusal shall be adjudged an escape in law.*

Action for an escape, upon 8 & 9 King William, cap. 27. sect. 9.

In

Michaelmas Term 3 Geo. 1.

In this case, the notice was given by the creditor, upon the *Friday*, to produce the prisoner upon the *Tuesday*. At twelve o'clock, the prisoner was demanded of the turnkey; but not being produced, the action was brought.

This being the state of the case, the *posse* was stayed by the direction of chief justice *Parker*, who tried the cause.

- * P. 395. * And it was now objected, *first*, That the notice was insufficient; and that *secondly*, if the notice was sufficient, the demand and refusal were not alledged as they ought to be.

1st Objection. The notice for producing the prisoner insufficient. It was observed, that this statute was a penal statute; because it subjected the gaoler to make satisfaction to the plaintiff, where possibly the plaintiff was not at all injured: That therefore such an interpretation was to be put upon the act, as might not subject the gaoler, to unreasonable, and unnecessary difficulties.

It was likewise observed, that the act of parliament had directed no particular sort of notice; and that consequently the notice as to the nature of it, must be governed by the rules of common law.

The statute is silent as to the place where the prisoner is to be produced; *this* the law supplies, and says the prison; for it will not be pretended, that by this statute the gaoler is bound to produce the prisoner at whatever place the creditor shall please to appoint.

So again, as to the time to be specified in the notice for the producing of the prisoner, the act is altogether silent; yet certainly there must be a time specified in the notice; for it will not be pretended, that a notice from the creditor to produce the prisoner generally, without appointing any time, would be good. It will not be pretended, that upon such notice, the marshal will be obliged to produce the prisoner, a week, a month, a year after, whenever it should please the creditor to demand him; for this would be at once to blow up the rules of the prison, which was certainly never the intention of the act, which in requiring a day's notice, does evidently suppose, the prisoner may possibly have the benefit of the rules.

- * P. 396. The question now therefore is, Whether the time appointed by this notice, be certain enough? Or whether it ought not to have been confined to some particular * part of the day; and not said on such a day *generally*?

It was said, that in confining the notice to some particular hour, or portion of time in the day, the inconvenience to the plaintiff could be none at all; because he had it in his own power to appoint that time which would be most convenient for him: Whereas on the other hand, the Marshal would be exposed to the trouble of an unnecessary attendance; as not knowing what time of the day, the creditor would demand him.

2d Objection. Demand of the prisoner improper in point of time. But if it should be said here, as probably it may, that the plaintiff having specified no particular time in the day, the law appoints a time, *viz.* the last hour in that day, unless by mutual consent, the parties

Michaelmas Term 4 Geo. I.

do it sooner ; then *secondly*, the demand is faulty, being made at ^{8 Mod. 70,} twelve o'clock at noon, when the defendant had until the close of ^{219.} the evening for the performance of it.

A 2^d objection as to the demand, was in respect to the person upon whom the demand was made, *viz.* the turnkey. It was observed from other clauses in the act, that by the word *deputy*, was to be understood a deputy marshal, *viz.* such a deputy as an action may be brought against ; and not any inferior officer, as a turnkey, &c. Demand in-
sufficient in
regard to the
person upon
whom it was
made.

If it should be said, that the deputy marshal seldom or never attends ; and that consequently it would be next to impossible for the creditor to make the demand of the marshal or his deputy ;. It was answered, that it must be supposed, that the marshal or his deputy are attending the duty of their office ; and that should a creditor not be able by reason of their absence, to have the benefit of this act of parliament, the court would punish them for their non-attendance.

* Court seemed inclined to think, that the marshal had all that day, for the producing of the prisoner. They seemed likewise to think, that by the word *deputy* was to be understood a deputy marshal, and not a more inferior officer ; but that, however, the plaintiff could not suffer by their non-attendance ; because a demand at the prison, tho' no body there, would be sufficient. * P. 397.
Not necessary
to produce
the prisoner
before the last
hour of the
day.
By deputy in
the stat. must
be understood
a deputy-
marshal ; and
not any infe-
rior officer.

Adjournatur.

Lord Cowper having surrendered the seals in the vacation, they were given to Lord Parker, who was succeeded as chief justice of B. R. by Sir John Pratt, a justice of that court, who was succeeded by Baron Fortescue, and he again by Sir Francis Page.

Easter Term

4 Geo. 1. Cur. Canc.



*I. C. as it seems
though name diff. 1.
Wm. 9 426. Rec. in
Cha. 409. Epith.
Cha. Rep. 145.*

Deed of settlement.

*The words,
to such daughter
as shall be
begotten, re-
late as well to
a daughter in
esse at the
time of the
settlement,
as those that
shall be born
after.*

*Acate.
W. 5th. 20.
h. as to*

*being of the
body to be begotten.
P. 398.
v. Annet. 31.*

THE interest of 500*l.* was settled to be paid to the wife for life; then the principal and interest to trustees to be paid to such daughter or daughters, as shall be begotten upon the body of the wife, share and share alike; but if the husband should die without * any daughters, then the money was to be paid to the wife.

At the time of making this settlement, there was a daughter *Anne*; and the husband died without any other daughter. And it was insisted upon, That this daughter was intitled to nothing under this settlement; because being in *esse* at the time when it was made, she was not within the words of the settlement, which run in the future tense, which *shall be begotten* upon the body of the wife, share and share like.

But *Parker* Lord Chancellor declared, That this was to put the most absur'd interpretation upon a settlement, that could be suppos'd, *viz.* That Parents should be solicitous for children in *Em-brio*, and unborn; and take no care of a child in *esse*. That the futurity meant by the settlement, did not relate to the time of the birth of the daughters, but to the death of the husband; at which time all the daughters then in being, that were the offspring of that coverture, became intitled to the money by this settlement.

— *versus* Mortimer Powell. In Canc.

THIS was a case arising from the will of *John Rawlins*.

Easter Term 4 Geo. I.

The question now reserved for the consideration of the court, upon a special report of the master directed by the court was, Whether a debt of 300 l. due to *Powell* the executrix, should be sunk in a legacy of 500 l. given her by the same Will ? The question was, Whether a debt should be sunk in a legacy ?

The bill was brought by next of kin, against the executrix, to have the surplus of the estate, undisposed of by the will, divided according to the statute of *distributions*. And the defendant had by her answer submitted, * That the surplus should be divided according to that statute ; but insisted upon the debt of 300 l. as what she ought to have satisfaction for, over and above her legacy. P. 399.

The bill did besides, seek a discovery of the assets of the estate, in the hands of the defendant.

Upon this it was decreed, That the defendant should account for the surplus, which should be divided according to the statute of *distributions* ; and as to the debt, it was directed, That the Master should look into it, and state both the *quantum* and nature of it.

And now upon the Master's report, who found the testator's debt to the defendant, near that sum ; and that the debt had sprung from dealings in trade between them, It was urged, as a known rule and course of the Court of Chancery, That where a debtor did by his will give to his creditor a legacy, superior in value to the debt due, the debt was always sunk in the legacy ; unless it did evidently appear from strong circumstances in the will, That it was intended otherwise as a beneficial legacy. And this was said to be founded upon that maxim in the civil law, *debitor non præsuntur donare*. Maxim. This was further enforced from *Cbauncy's* case, where it had been so ruled by the Master of the rolls, a term or two ago.

This was opposed by the defendant's counsel, who distinguished this from the case of *Cbauncy* thus. A servant-maid had lived long in a place without receiving any wages ; her wages were at last by the master computed to amount to 100 l. and a bond given for the same ; the master soon after dying gave her a legacy of 500 l. which he thus express'd, *for her faithful services*. Now it was said, That this bond being for the money due for her service ; and this legacy being given her for her faithful services, it was plain, That the testator intended * this legacy in satisfaction of all that was due to her. * P. 400.

Then the case of *Cuthbert* and *Peacock* was insisted upon, as reported by *Salkeld* 155. where the contrary was ruled by Lord *Cowper*, saying, It was good equity to make the testator both just and generous, if he intended to be both. This interpretation most agreeable to the words of the will, where it is express'd as a gift. Now a man is never said to give, but pay a debt. 2 Vern. 593, 594.

Easter Term 4 Geo. I.

It was said further, That since it may be, the executrix would not have been decreed to account for the surplus without her consent, it would be the harder upon her to sink her debt.

Legacy to a creditor, tho' greater than the debt, taken as a gift, and not in satisfaction. Whether a legacy to an executor excludes him from the surplus of the estate undevise'd ?

Lord Parker : Let her have her legacy over and above her Debt. I have the more compassion for this executrix, because of her submission to account for the surplus. I am not satisfied with that Notion, That a legacy to an executor, excludes him from the surplus; and therefore without her submission, know not whether I should have decreed her to account for it.

How the course of the court has wavered in respect of the surplus.

Upon this, Mr. Cowper told the court, That the first time this doctrine prevail'd, was in the case of *Foster and Mount*; since which time there have been several decrees in pursuance of it.

1 Vern. 473. 2 Vern. 674, 676, 677.

Parol evidence admitted to explain the intent of the testator, consistent with the will, and in affirmance of the rules of common law. Ant 99. 2 Vern. 593, 594. * P. 401.

But that the contrary doctrine had prevail'd in the case of *Littlebury and Buckley*; where it was resolved, That notwithstanding the legacy, the executor should have the surplus. Indeed there it appeared by parol evidence, That it was the intention of the testator, that the executor should have the surplus; Lord *Guernsey* (for it went up into the House of lords) being of opinion, That parol evidence not repugnant to the will, and in affirmance of the rules of common law, should be allowed of. Since that case, it has been so decreed by Lord *Cowper*, without the help of such evidence.

Ashton *versus* ———. In Canc.

Marriage settlement. Portions for younger children, decreed to be raised by sale.

THE question in this case arose upon the penning of a marriage settlement of Sir *Ralph Ashton*, and upon that clause of it which related to a provision for younger children.

By that clause, after the creating of a term of 99 years, and vesting it in trustees for that purpose, it was provided, That in case he had both sons and daughters, the daughters should have a 1000*l.* each, to be paid them at the age of 21. or day of marriage, which should first happen; if there were no son and but one daughter, then she was to have 5000*l.* but if there were more daughters, then there was to be 8000*l.* equally divided among them; which sums were to be raised out of the rents, issues and profits of the estate, as soon as they conveniently could. The father died, leaving three daughters and no son; the three daughters bring their bill, to have the 8000*l.* raised by way of mortgage or sale, and for the interest of the money, from the time of their father's death.

It

Easter Term 4 Geo. I.

It was urged for the plaintiffs, That there had been many cases, ^{2 Vern. 420,} where a term being created for the raising of portions for younger ^{421, 424.} children, to be paid out of the rents, issues and profits of the estate, and not said by sale or mortgage; yet this court has decreed a sale or mortgage, if that has appeared to be the most convenient way for the raising of it. *Stanbope and Packer*, 2 *Georgii*. 1 *Showers* 176. 2 *Chanc. Rep.* 204. 1 *Showers* 240.

Profits is a word of large extent; a grant of the profits of land, is ^{Ant. 94, 365.} in law a grant of the land itself.

It was observed, That this practice of the court of chancery was very rational, and in support of the intention of the parties; because it was for the preferment of daughters in marriage.

* It was acknowledged by the counsel of the other side, That there ^{* P. 402.} were several cases, wherein this court had decreed a sale or mortgage, though those words were omitted; but then they said that this Distinction was to be observed, *viz.* That the Court of Chancery had exercised this Power, where a time being limited for the payment of the portions, it appeared altogether impossible that they could be raised within the time so limited, by the annual profits, rents, &c. but that here no time at all was limited.

It was replied by the counsel for the plaintiffs, That here was a time limited for the payment of these portions, *viz.* upon the death of the father without issue male; for then says the deed, the portions shall be raised as soon as conveniently they may, which is in judgment of law presently, from which time the portions are to carry interest.

And of this opinion was Lord Chancellor *Parker*, and decreed it accordingly.

Target *versus* Grant. In Canc.

See Gilb.
Rep. in
Equity 149.
S. C.

A TERM was devised by *William Target* to *Henry* his son, during his minority; and if he attained the age of 21. then it was devised to him for the term of his natural life, *and no longer*; and remainder to such of his issue to be begotten, as he the said *Henry* should devise the same unto; and if he should *die without issue*, the rest and residue of the term was devised to his brother *Albinus Target*. ^{Question, Whether an estate-tail, or for life only, was devised?}

The question was, if this was an estate-tail in *Henry* or not? for if it was, or in the nature of an estate-tail, the remainder to *Albinus* would be void.

Easter Term 4 Geo. 1.

It was urged, That this was an estate-tail by implication; because it was, *And if he died without issue generally, and not without issue living at the time of his death.*

* P. 403.

* It was argued on the other side, That this was not an estate-tail; for though an estate-tail has been held good by way of implication, *that* was ever in maintenance of the intention of the deviser; whereas *here*, to make an estate-tail by implication, or an estate in nature of an entail, was to defeat the intention of the deviser, and make that remainder void, which he intended should be good. Cases quoted in argument of the case, *Popbam and Bamfeild*. *Peacock and Spooner*. *Loddington and Kime*, 3 *Lev.* 431.

Salk. 236.

Lord Parker: *Henry* by this will takes only an estate for life, with a power of disposing of it, to which of his issue he thinks fit; the words *no longer* plainly shew this to have been the intention of the testator.

Of entails by implication.

In case where an entail is created by implication, it is ever in favour of the heir at Law; to whom no estate being given by the will, so as to enable him to take by purchase, and there being a necessity, if he takes at all, of his taking by descent; therefore to support the intention of the testator that the heir should take, the law creates by implication an estate-tail in the ancestor, to vest it in the issue by descent. But here this reason entirely ceases; for here is a provision, how it shall go to the issue, *viz.* by the devise of the party; until when nothing vests in the issue.

Import of the words dying without issue.

The words *dying without issue*, are capable of two senses, *viz.* a legal one, and a vulgar one; a legal one, wherein a man is said to die without issue, whenever his issue fails, though some ages after the death of the party. And in this sense, for the support of the intention of the parties, the words shall be understood; but never for the destruction. The vulgar acceptation of the words which I embrace here, is *dying without issue living at the time of his death*. The case of *Loddington and Kime* is wrong reported by *Levinz*, though of counsel in it; but as to this point it is right enough, and a strong case.

Salk. 224, 225.

See Gilb. Rep. in Equity 146. S. C. Trust.

* P. 404.

* Nab *versus* Nab. In Canc.

ONE of the points in this case, besides matter of account, was this. A daughter devises all her personal estate to her mother, to dispose of as she should think fit; and then adds by word of mouth, You may if you please, give 180*l.* to my niece; but I leave it intirely to you.

The

Easter Term 4 Geo. 1.

The niece brings her bill for this 180 l. and likewise suggests a secret trust in the mother as to the 180 l. The mother in her answer owns the will, and the parol declaration of the daughter; and that she once had it in her thoughts to have made the 180 l. 200 l. but that the niece had since behaved herself so, that she was now resolved to give her nothing.

It was proved in the cause for the plaintiff, That the daughter after making the will, had said she had left her niece the plaintiff 180 l. as a legacy. But the parol declaration of the daughter, appeared only by the answer of the defendant upon oath.

The case of *Kingman and Kingman* was chiefly insisted upon 2 Vern. 559. for the plaintiff. There the plaintiff thought fit to disinherit his son, in favour of a waterman, who had the good fortune to be of his name; and then tells the waterman, If his son should behave himself respectfully to him, and not disturb him in the enjoyment of his estate, he might, if he thought fit, give him twenty or forty pounds per quarter: And here, though an ejectment was brought at common law by the heir for the whole estate, and after that a bill in equity, yet the waterman was by this court decreed to pay the 40 l. per quarter. It was likewise held in this case, that if the statute of frauds be not insisted upon, the court will compel the performance of an agreement, though not in writing.

* *Parker*, Lord Chancellor: No colour for this to be looked * P. 405. upon as a legacy; because not in writing within the time appointed by the act. * The mother to be esteemed as a trustee for the niece: * Six days. Not necessary by the statute of frauds, for a trust that relates to the personalty to be in writing; if it were, it is now in writing by the answer.

This is not such a trust, as not to be forfeited; but then the mother should have assigned some particular instance of misbehaviour in the niece, and not in general only.

The mother must pay the 180 l. but without interest.

As there is no proof of the parol declaration of the daughter, but by the answer of the mother, the answer must be taken entirely as it is; and no part of it must be impeached by any other evidence.

Where the whole proof of any matter arises from the defendant's answer, the answer must be taken entire.

Trinity

* P. 406.

* Trinity Term

4 Geo. I. B. R.

Thornby and Fleetwood. See *Ant.* 113, 136.

Stra. 318.

JUDGMENT being given for the defendant in the Court of Common Pleas, and writ of error brought in B. R. Sir Thomas Powys argued for the plaintiff in error, to the following purpose.

Stat. prime
Jacobi about
papists.

The great and chief, though not the only question in this case is, The construction that is to be put upon the statute *primo Jacobi*.

It will be material to reflect a little, both upon the end of this act of parliament, and the time when it was made.

As to the end and design of it; it is plainly levelled against popery, and to secure and preserve the reformed religion.

As to the time when it was made; every one conversant in our history, knows the continual struggles between the popish and protestant interest, in the time of Queen *Elizabeth*. And the education of youth in popish seminaries, being thought at that time a thing of dangerous consequence to the protestant religion, it was * P. 407. provided against by an act of parliament in the time of Queen *Elizabeth*; but that act of parliament proving insufficient, this act of parliament upon which the present question depends, was made in the first session of the first parliament of King *James* the first.

Not therefore to be supposed, That this statute relating to a matter the parliament shewed such an immediate concern for, should come into the world still-born, without life and energy.

This act of parliament consists of two parts: By the first the Roman catholicks are disabled from acquiring any thing new; by the second they are disabled to retain what they are already possessed of.

Trinity Term 4 Geo. 1.

The present question depends upon the first of these.

It will not be denied, but that the words in the act (if the savings, to the posterity, and in case of conformity, were out of the way) are full and comprehensive enough, to prevent any estate vesting in Roman Catholics.

Resolved in Lord *de la War's* case, 11 Rep. That he never was a Baron; and yet the words not stronger than these in this act

It must likewise be granted, That Papists are disabled from taking any manner of way, by statute of 11 & 12 W. 3. and yet the words there used, not stronger than those used in this. Stat. 11 & 12 W. 3.

The same words used in statute of Queen *Elizabeth*, for prevention of simony. Now the interpretation always put upon this act has been, That whoever came in simoniacally, by induction gained nothing. A simoniacal contract has ever been esteemed a good defence to an action brought for tythes. Stat. 31 Eliz.

The words of the act, as to the saving to the heir, are, *In respect of himself only, but not his heirs or posterity*. Hence it is argued, That the estate must vest in the ancestor, or else the saving to the posterity will be frustrated.

* In answer to this objection, proper to observe, That this clause relates equally to goods, chattels, terms for years, cases wherein the heir is not concerned, as well as to inheritances descendible to the heir; that therefore the same interpretation ought to be put upon the act in both cases: Now it is plainly absurd to understand the act, of taking the profits of goods, money, &c. P. 408.

It is a general rule, that *Exceptio probat regulam in rebus non exceptis*; the saving therefore the right of the heir, works more strongly and totally to the exclusion of the ancestor. Maxim.

Another rule to be observed in the interpretation of statutes, is, That a saving, or an exception in a statute, must never be so interpreted as totally to destroy the purview. Now here the counsel for the defendant are endeavouring in favour of the heir, (a secondary consideration of the parliament) to overthrow the primary and principal intention of the act, viz. the disabling of the ancestor. Savings or exceptions in statutes, not to be so interpreted as to destroy the purview.

But then it will be asked, What is the use of the saving clause?

To this it may be answered, 1st, That it was to shew that the incapacity was only personal, worked no corruption of blood, &c.

Nor is it any objection against this, That in this respect it is entirely unnecessary; for saving clauses are often inserted in acts of parliament for the satisfaction of ignorant people.

2^{dly}, The heir is by this means enabled to derive his title from the father, though never seised, as if he had actually been seised.

The interpretation contended for by them, that invests the Roman Catholic with such an interest in the estate, as will enable him to alien, and dispose of the estate, by recovery, &c. at pleasure, but

Trinity Term 4 Geo. I.

restrains him only from taking the profits, is such a one as can neither be collected from the words or design of the act.

* P. 409. * It has been before observed, That these words, *take, enjoy, &c.* are extended to goods and chattels, as well as inheritances; and that this being one entire clause, ought to receive an uniform interpretation: But this interpretation of theirs, when applied to chattels, plainly absurd.

Besides, this interpretation is plainly contrary to the words of the act, which are universally exclusive, without any exception or qualification whatsoever: Whereas, according to this interpretation, he must inherit, he must take, and be owner; and as such, alien and dispose at pleasure, by fine, &c.

If the question is asked them, Who shall take the profits? They are much at a loss; a plain argument that their interpretation was never thought upon by the law-makers, who otherwise would in plain and clear terms have told us, who should take the profits, as they have done in the following act of 3 *Jacobi*.

Ant. 358. The act therefore being silent in this case, they tell us, That according to the rules of law in other cases, the crown shall take them.

Salk. 395. But this is to bring the act to just nothing; for it is clear law, That alienation before seisin, will oust the crown of this interest they are so liberal in bestowing upon it. *Raymond* 17. 5 *Mod.* 101.

But then we are told, That however, the landed interest of the Papists will be lessened, should they thus alien; which is a very odd way of putting people into estates, in order to get them out afterwards.

Our interpretation supports the intention of the act, inasmuch as it plainly discourages parents from sending their children for education into Popish seminaries; since by that they are cut off from their country, and made *quasi* aliens, and outlawed persons.

Their construction directly contrary to all rules of interpretation, observed in acts of the same nature; and that whether this act be considered, either as an act made for the advancement of religion, or as

* P. 410. an act * made for the suppressing of publick mischiefs, and promoting the publick good.

In *Hobart* 157. we are told, That acts of parliament made for the advancement of religion, shall in support of that intention be stretched even beyond the words.

Now here the words are plainly with that interpretation, that best supports the intention of the act.

In 11 *Co. Rep. fol.* 7. several instances are put of acts of parliament, made for the advancement of religion, that have had a large and liberal interpretation put upon them.

In 11 *Co. Rep. fol.* 34. *a. Poulter's case*: Instances are given of acts of parliament, which though criminal ones, have yet been extended

Trinity Term 4 Geo. I.

tended by equity ; because made for suppressing of publick mischief, and the advancement of the publick good.

It cannot be doubted, but that the act of parliament we are now upon, deserves a large and liberal construction upon both these accounts.

Their interpretation contrary to the rule of the civil law, which is, *Maxim. In dubio hæc legis constructio, quam verba ostendunt.* And none but lawyers would ever have thought upon a different interpretation from that which we put upon it.

It is pretended, that their interpretation is made in favour of the heir ; but yet by this means the ancestor is enabled to alien, and so disinherit the heir ; which if a protestant, he will most certainly do.

But it will be demanded of us, where is the estate during the life of the persons thus disabled ?

Here I answer in the *first* place, that most certainly it shall not be in the person disabled, if there is a possibility that it may be elsewhere, *Maledicta expositio quæ corrumpit textum.*

Maxim.

It is a rule in the interpretation of statutes, that whatever is a necessary and unavoidable consequence * of an act of parliament, is as much a part of that act, as if inserted *totidem verbis* in the act. *Hobart 293. Brook Tit. Coron. 204.*

** P. 411.*

There is another rule to be observed in interpreting acts of parliament, *viz.* That where any point is plainly and directly enacted, such an interpretation must be held, as to render the plain design of the act practicable, notwithstanding the rules of common law should be hereby overthrown ; for it is the proper business of acts of parliament to make alterations in the common law. Tho' at the same time it must be acknowledged, that an act of parliament ought to be interpreted by the rules of common law, as far as is consistent with the preserving the end and design of the act.

In the *next* place I answer, that if the land never vested in the party himself, as we say it did not, the King cannot have it. *1 Inst. 13. a.*

In the *third* place I answer, it cannot go to the issue of the person disabled, according to that maxim of law, *Non est hæres viventis.*

Maxim.

Therefore it must necessarily go to him in reversion ; as in case of an estate-tail, upon failure of issue, it reverts to the donor and his issue ; or in case of a fee-simple, it shall escheat to the Lord and his heirs, of whom the land is held.

But it is objected, if the land is to go over to him in reversion, how can the ancestor have it back again in case he conforms, as it is plainly provided by the act that he shall ?

Trinity Term 4 Geo. I.

To this it may be said, that the meaning of that clause in the act, is not, that upon conformity he shall have back what is gone over and vested in another ; but that the incapacity being removed by his conformity, he shall from the time he so conforms, be capable of inheriting whatever shall fall to him in a course of descent, as if he had never been disabled.

* P. 412. But supposing for the encouraging of conformity, that the act should look backwards, and give him that * inheritance, which would have vested in him but for this incapacity now removed ; it is strange or difficult to conceive, that an act of parliament may do it ?

Of vesting
and divesting
of estates.

If an act of parliament repealing an act of parliament, be repealed, the first act is consequently set up again.

It appears from the case of the prince of *Wales*, in the 8th *Rep.* That for a state of inheritance to vest and re-vest, is not a new thing, upon an act of parliament.

Raymond 355. It is said, that an act of parliament can create an estate-tail without a donor ; and when we see estates limited for a particular purpose, we are not to measure the validity of such limitations, by the strict rules of the common law ; for the parliament can control the rules of common law. 13 *Co.* 64. It can make an estate of freehold to cease, as if the party were dead ; as in case of a parson who accepts a second benefice, contrary to the stat. of 21 *H.* 8. of pluralities. 6 *Co.* 40. *b.* And for this cause, Lord *Hobart* says pag. 346. That judges have authority to mould statute laws according to reason and best convenience, to the truest and best use ; especially considering that the parliament proceeds many times according to natural equity, *secundum equum & bonum*, which is *lex legum*, without respect to legal ceremonies. *Hobart* 224.

So that where the drift and sole intent of an act of parliament is most plainly discerned, as in this case, and yet that intention cannot be observed, were the same in a deed, by construction according to the rules of law ; we ought rather to presume, that the parliament (in whose power it was so to do) resolved to leap over and waive the mechanical rules of law, and to make a particular law for that occasion.

* P. 413. In *Hobart* 257. *Beaumont's* case, reported 9 *Co.* 140. is put, *John Beaumont* and his wife being seised in special tail, remainder to *John Beaumont* in fee ; he alone levied a fine to *Edw.* 6. in fee, which estate came to the Earl of *Huntington* in fee ; *Beaumont* having issue died, * his wife entered ; the Earl of *Huntington* confirmed the estate in the wife, *habendum* to her and the heirs of the body of her and her husband. And it was ruled that the confirmation wrought nothing, because she had as great an estate before ; and also the issues could not be made inheritable, which were before barred by their father's fine, and the estate-tail as against them lawfully given to another. And it was further resolved by way of admittance, That if that remainder in fee had not been to *Beaumont* himself, but to a stranger

Trinity Term 4 Geo. I.

stranger, the entry of the wife had restored that remainder to the stranger, and had left nothing in the conusee, but a meer possibility : So she hath the tail not only for herself, but to the benefit of other estates growing out of the same root with his ; and yet during the life of *Beaumont*, the entail had been barred, and all had been in the conusee, and the wife had had nothing but a possibility *via versa*.

And upon this case *Hobart* observes, that an estate-tail may cease for a time, and rise again, and he in reversion may enter during the cesser of the estate-tail.

Litt. Sect. 646, 647, 649, 650. there are cases put, where, by the common law, both freehold and estates-tail shall be in abeyance, viz. *in nubibus*, in consideration only of law, for a time, or in other words, shall cease for a time.

Litt. Sect. 613. Tenant in tail grants all his estate to another, *quoad* his issue, this works no discontinuance ; but *quoad* himself the reversion is in abeyance, for he shall have none left in him against his own grant.

1 *Co. Inst.* 345. a. Tenant in tail of lands holden of the king, is attainted of felony, the king after office seisseth the same, the estate-tail is in abeyance.

Lessee for life becomes professed, there shall be no occupancy, but the lessor may enter, for he is dead in law ; but upon his *dérainement*, the lessee may re-enter * upon the lessor, to whom the land went * *Ant.* 360. *P.* 414. during his profession. 2 *Rolle's Abr.* 150. b.

Tenant in tail dies, (his wife *ensient* with a son) without issue, the donor may enter ; but upon the birth of the son, the estate-tail is set up again. 7 *Co. Rep. fol.* 8. b. *Bedford's case*.

As in that case, the expectation of the birth of a son, did not prevent the going of the estate to the donor ; so by parity of reason, the expectation of conformity in our case, will not hinder the estate from going over to him in reversion.

In case of a fee-simple, where the uncle enters before the birth of a child, that after-born child is not intitled to the mesne profits.

In like manner in the spiritual court, in case of a divorce *a vinculo matrimonii*, the husband is not answerable for the mesne profit of his wife's estate.

But the life of *Philip* is objected to us, and we are told, that he in reversion can never enter while there is issue of tenant in tail alive.

To this I answer, that the ground upon which this objection is founded, is much too large : For according to *Hobart* 345, 346. and Sir *Nicholas Carew's* case, quoted for it, it is not enough to keep out the reversioner, that there is issue, unless this issue be heir ; as in case of the attainder of the ancestor. Now *Philip*, tho' he is issue, yet is not such issue as can inherit ; and therefore is no more an heir in tail, than a man can be said to be heir in the life-time of the father.

Trinity Term 4 Geo. I.

Nay not enough that there be issue, or an heir of the body; nay, and that he may possibly inherit; but he must be then inheritable, or else it will go to the reversioner. *Co. Lit.* 24, 25. *a.* Lands given to a man, and the heirs male of his body; the man has issue a daughter, who has issue a son: Here this son is both issue and heir, and yet is not inheritable, because his * title must be conveyed thro' all males; therefore the reversioner must have the lands.

* P. 415.

Where a person is incapacitated to take by descent, because he is attainted, or an alien, or a monk; if this incapacity be taken off, by pardon, by naturalization, deraignment, he shall have the land: But yet the possibility that this incapacity might be removed, at the time when the descent happened, cannot hinder the reversioner from entering; so neither can the possibility of conformity, hinder the reversioner from entering in our case.

Afterwards this case went up to the house of Lords, and in the printed case delivered by the defendant, the strength of the objection arising from the life of *Philip*, who by the special verdict was not found to be without issue, is thus expressed.

Unless it appears that there is a good title in the lessor of the plaintiff, the plaintiff cannot recover, whether the defendants have any title or not; for the plaintiff must always recover by the strength of his own title, not the weakness of the defendant's. It seems very strange and repugnant to all the rules of law, that there being an estate-tail, created to the heirs males of the body of *Thomas 1st Lord Gerard*, and there being issue of that entail yet in being, who may also have issue male, the Dutchess of *Hamilton* should claim by virtue of the remainder to the right heirs of *Charles Lord Gerard*, who settled the estate, while that estate-tail hath a continuance; her remainder being to take place upon the death of *Lord Thomas* and all his issue male. And it seems still more difficult for her to do this under an act of parliament, which is so far from giving any thing to her, that it expressly preserves the right of the offender's posterity, (which is endeavoured to be prevented and destroyed by her) and *that* in the very clause that lays the disability upon the ancestor.

* P. 416.

* And altho' there be a present disability in *Philip*, yet it is but personal; and the estate-tail must continue in him, for the benefit of the issue, which admitting he had none, he still may have.

Willis and Lucas. In Canc.

Will Rep.
472.
Devise of an
estate by im-
plication.

J. S. had three sons *A. B. C.* and daughters, and being seised in fee of land, part whereof was gavel-kind, devises it by his will to *C.* his youngest son, he or his heirs paying 10 *l.* per ann. to *A.* 10 *l.* per ann. to *B.* so much a year to the daughters, &c. for the term of his life; and after the death of *C.* and his wife, then it was to go to the

Trinity Term 4 Geo. I.

the sons and daughters of C. according as he should have one or other, equally to be divided between them. C. dies, living his wife; his wife enters, as conceiving it a devise by implication to her for her life. The heir at law, supposing the land not at all disposed of by the will, during the intervening time between the death of C. and the death of his wife, and that it ought therefore in the interim to descend to him, brought his ejectment at common law; but the wife protecting her estate by mortgage, nonsuited him. He therefore now brought his bill to discover these incumbrances, and whether they were not satisfied.

The wife in her answer insists, in the *first* place, that this is a devise to her by implication for life: And *2dly*, that tho' by the rigorous rules of law, this should not be so; yet that this estate being her chief dependence, and her father-in-law having often told her before the making of his will, that he would give it her for life, and having likewise after the making the will declared that he had done so; she hopes the plaintiff shall not have the aid of a court of equity to get that from her, which her father-in-law so plainly designed to give her.

* The difference taken in 13 H. 7. and 2 Cro. 75. as to estates by implication, viz. That where the estate is devised after the death of the wife, to the heir at law, *there* the wife shall take by implication; but not where the devise is over to a stranger; insisted strongly upon in favour of the plaintiff.

* P. 417.
For the plain-
tiff.
A devise of
lands to the
heir after the
death of the
wife gives by
2 Vern. 572.

implication an estate for life to the wife. Otherwise where the devise is to a stranger.

As also the rule laid down in the case of *Gardiner and Sheldon*, Maxim. that an estate should never be raised by implication, unless where it was a necessary and unavoidable one.

It was urged in favour of the wife, that by a necessary implication in the meaning of the law, was not to be understood a natural necessity, that the estate could go no where else; but a necessity arising from the plain intention of the testator in his will.

For the de-
fendant.

It was also urged, that the heir at law by having 10 l. *per annum* given him, when by law he was entitled to the whole, was evidently by the intention of the testator, as much excluded from having the land descend to him in the mean time, as if the devise had been to him after the death of C. and his wife; that if the land should descend to the heir at law, it would not in him be subject to the payment of the annuities, which would be plainly contrary to the intention of the testator.

It was also insisted upon, that part of these lands being in *Kent*, must be taken to be in the nature of gavelkind, and then all the sons and their representatives make but one heir, in which case the descent must be intire; but this cannot be, because as to a third of the

land

Trinity Term 4 Geo. I.

land, the representative of C. being heir at law, and the person to whom the devise is made, it will be a devise of *that* by implication to the wife, according even to the rule insisted upon by the other side.

- * P. 418. * Then there remains two thirds to descend, which will be a descent neither by custom, nor by the common law; not by the custom, for that is already broken in upon, by the estate by implication, raised by the will; not by the common law, for these two thirds must go to the two sons, or their representatives, and the representative of C. And here again the wife must have by virtue of their own rule, an estate by implication in the third part of the two thirds; because the devise is to the representative of C. heir at law, according to this way of taking it, of a third part of the two thirds.

Court.

Lord Parker was of opinion, that the wife ought to have an estate for life by implication, the heir at law being excluded by the annuity; but this being matter triable at law, he directed an issue accordingly, where the wife was ordered to waive her incumbrances, and insist only on her title at law.

No regard
to be had to
parol decla-
rations in a
devise of land.
2 Vern. 98.
337, 339.
624, 625.

Parol evidence was offered to prove the intention of the testator to give it his wife; but the chancellor refused to receive it.

Michaelmas

* Michaelmas Term * P. 419.

5 Geo. I. Cur. Canc.

Marks and Marks.

TH E testator did by his will, bearing date *April 12, 1697*, Eq. Abr. 106. pl. 6. devise land to his wife *Anne* for life, remainder to his second son *Daniel* in fee; provided and nevertheless, that Pre. Ch. 486. Stra. 129. if his third son *Nathaniel* should, within three months Ex. 129. after the death of the wife, pay the sum of 500 l. to *Daniel*, his executors or administrators, then he devised it to *Nathaniel* and his heirs. What after personal, what not. *Nathaniel* died in the life-time of the wife; afterwards the wife dies, and *Daniel* enters.

Now the question was, whether the heir of *Nathaniel* should be allowed to perform the condition, by payment of the money, and so be let into the land?

The reason why this, being a point purely at law, came to be spoken to in a court of equity, was, that by reason of marriage settlements, mesne incumbrances, &c. it became uncertain to whom the heir of *Nathaniel* (admitting by law he might perform the condition) was to make the tender: And therefore he brought his bill in equity for relief and direction, which bill was filed within the three months, limited for the performance of the condition.

* This term *Parker* Lord Chancellor, assisted by *Sir Joseph Jekyll*, * P. 420. decreed in favour of the plaintiff.

Sir Joseph spoke first to the following effect.

The question at law to be resolved in this case, before any decree can be made, is Whether the plaintiff as heir of *Nathaniel*, can enter upon the estate, upon payment or tender of the money? I am of

Michaelmas Term 5 Geo. IV

opinion that he may; and that this is an act not personal to *Nathaniel*, but what may be performed by the heir. If this had been a condition, the law had been plainly so: So is *Litt. Sect. 334*, scoffment upon condition, That the feoffor shall pay such a sum, at such a day, &c. Feoffor dies before the day, &c. yet the heir, tho' not mentioned, may tender, &c. *Nay held Sect. 336*, That a second feoffee, who has only a privity of estate may do it.

But this is not the case of a condition, but of an executory devise. In the case of a condition, the heir has a right antecedent to the performance of the condition; and he does not gain a new estate, but reverts an old one by the performance of the condition. *Cujus contrarium verum* here; for upon performance of the condition, the payment of the money, (to speak in the language of the law) a new created estate vests in the heir. *Co. Lit. 219. b.* Lord Coke's words are these, *That a condition which is to create an estate, is to be performed by construction of law, as near the condition as may be, and according to the intent and meaning of the condition, albeit the letter and words of the condition cannot be performed.*

Great latitude of construction allowed in the words of a will, to support the intention of the testator.

The case before us, is a case upon a will, where the law has ever allowed the greatest latitude of construction in support of the intention of the testator.

Nobody can doubt but that the intention of the testator was, to give the land to *Daniel* only in the nature of a security for 500 *l.* and that *Nathaniel* was to have the fee simple.

* P. 421.

As a future interest in a term will go to the executor, so a future interest in an estate of inheritance will descend to the heir.

* I am of opinion *Nathaniel* had such a future interest or possibility in the inheritance, as might descend to the heir, tho' it never vested in the ancestor. *Lamper's* case is an express authority, That a future interest in a term shall go to the executor; and it seems to me to fall in with the reason of that case, that a future interest in an estate of inheritance should descend to the heir.

Stat. de Donis

Before the statute *de Donis*, the donor had but a possibility, barring after issue, at the pleasure of the donee; but yet this possibility was descendible to the heir. 2 *Inst.* 335.

Where an heir may take by descent, an estate, which could never vest during the life of the ancestor.

1 *Inst.* 378. b. A case is put, where the heir shall be in by descent of an estate, which could never vest in the ancestor during his life. Land given to *A.* and *B.* so long as they live jointly together, the remainder to the right heirs of him that dieth first; *A.* dies, the heir of *A.* shall have the land by descent; and yet the remainder did not vest during the life of a *A.* for the death of *A.* must precede the remainder.

In the case of *Oates* and *Fritb*, *Hobart* 130, it is said, that the heir is in representation in point of taking by inheritance *eadem persona cum antecessore*.

That

Michaelmas Term 5 Geo. IV

That the law is the same, in case of an act executed by way of use, is plain from the 3d point in *Shelley's* case, 1 Rep. 98. a. And the rule there laid down is applicable here, viz. That the heir shall be in by descent, where the land might possibly have vested in the ancestor.

The case of *Spring and Cesar*, Rolle's Abr. 420, 469, a strong case to prove, that in a conveyance by way of use, the heir may pay the money, if the ancestor died before the day.

As to the case of *Bret and Rigden*, that not applicable to this case. For there was no compleat devise; because the ancestor to whom the devise was made, dying in the life-time of the devisor, there was no devisee at the time when the will was to take effect: But here there * is a compleat devise, and of such an interest or * P. 422.

possibility, as might have vested in the ancestor, But it is objected, that the heir has his election, whether he will pay the money or not.

Resp. True; but as this election is in favour of the heir, it ought not to be turned to his prejudice.

The four reasons given by Lord Coke in his commentary upon Litt. Sect. 334, are all applicable to the case in question; I am therefore of opinion that the heir may pay the money, and shall take the land as an executory devise, and by way of descent.

And tho' before the case of *Lloyd and Carew*, it seems to have obtained for law, that no executory devise of a fee upon a fee should be allowed of, unless upon a contingency to happen during the life of one or more persons in being at the time of the settlement; and consequently the limitation to *Nathaniel* would have been void, because dependant upon a contingency to happen within three months after the death of the wife; yet since that case, which went thro' the house of Lords, and is reported *Showers's Cases in parliament* 137, the law is now settled, that in case of a contingency, that cannot in the nature of it precede the death of a person, a reasonable time may be allowed subsequent to the decease of that person for performance of the condition, and a fee limited thereupon is good. In that case, a year was held no unreasonable time, a fortiori not three months, which is the present case.

The plaintiff has good equity to be directed and indemnified in the payment.

Parker Lord chancellor: I am of the same opinion with the Master of the Rolls; and in what view soever I consider the present question, am the more confirmed in it. Tho' the words of the will are only, that *Nathaniel should pay*, and not *Nathaniel* and his heirs; yet this is only a plain mistake in the will, which is a conveyance, that the law supposes to be made when a man * is *inops consilii*, and therefore allows great favour to be used in its construction.

Executory devise of a fee upon a fee.

The law allows great favour in the construction of a will, as supposing it to be made when a man is *inops consilii*.

Ant. 420.

The * P. 423.

Michaelmas Term 5 Geo. I.

The plain intention of the testator, was to provide for his children ; to the one he intended to give 500 l. to the other the land.

At common law, if *A.* had made a feoffment to *B.* for life, remainder to *C.* in fee, upon condition, that if *B.* should pay so much money to *C.* that then *A.* should have the land ; *A.* has a right to take advantage of the performance of the condition, which right vests in *A.* the ancestor, and is in its own nature descendible to the heir, but not assignable.

Maxim.

If *Marks* the testator had made a feoffment to *Daniel*, upon condition, that if the testator should pay so much money to *Daniel*, then *Nathaniel* should have fee ; this is a condition, the right of performing which descends to the heir of the testator, and the heir would be at liberty to take advantage of it ; for the limitation of the fee over to *Nathaniel* would be void, by a particular maxim of the common law, which will not allow a fee to be limited upon a fee ; or by that other maxim, which excludes a stranger from taking advantage of a condition.

Stat. of
Wills.
Stat. of Uses.

Since the statute of wills, and statute of uses, executory devises and springing uses have been allowed of.

These were first allowed of with respect to the testator or party himself, afterwards it came to be allowed of to other persons.

And therefore at this day, in devises and limitations of uses, an estate may be limited over to a third person, upon the defeasance of a former estate in fee, if the condition be not too remote in point of time. And tho' there have been words found out to save, in appearance, the maxims of the common law ; yet in effect and in truth, the very benefit and advantage of the condition is passed over to a third person ; notwithstanding the maxim of law, that a stranger cannot take advantage of a condition.

* P. 424.

* In this will the case nothing but this.

The testator gives the land to *Daniel*, redeemable upon the payment of 500 l. ; and he gives the equity of redemption to *Nathaniel* : *Nathaniel* therefore seems to me to have an equity of redemption, that remains open to him in a court of equity, as well after the time limited, as before.

Indeed there might have been a difference between this case, and the case of a common mortgage, (where, tho' when the day is past, and so the legal estate is absolutely vested in the mortgagee ; yet in equity a right to redeem remains) had *Nathaniel* been here to come for relief against the heir at law : But this is not the case ; for he comes for relief against a third person, who had the estate vested in him for no other purpose but to make the estate redeemable.

The

Michaelmas Term 5 Geo. I.

The question that remains is, Whether this advantage be not lost, by the death of *Nathaniel* before the day. Which imports these two objections.

1st, That the payment of this 500*l*. is personal to *Nathaniel*; and therefore not to be performed by any body else.

2^{dly}, That the contingency should have happened in the life-time of the ancestor; for the heir is not to take by purchase, but by descent.

As to the first point; I am of opinion, That this is an act not personal to *Nathaniel*.

Payment of a small trifling sum, may be considered rather as a ceremony, than a valuable consideration; and this I take to be the ground, upon which the two Judges went, who in the case of *Spring* and *Cæsar* held the payment of the ten shillings to be a personal act; for when the sum comes to be considerable, as here it is 500*l*. the payment of it is never esteemed a personal act: And this appears throughout *Englefield's* case in the 7th Report.

* The 334th *fest. of Litt.* so often quoted, an express authority, * P. 425. That this is not a personal act.

So that I am of opinion, That if the heir pays, the ancestor does, to all intents and purposes of this will, pay in him who is his representative.

As to the second point, That the heir must take by descent, and not by purchase; I am of opinion, That he does take by descent, or in nature of descent.

In *Wood's* case, quoted 1 *Rep.* 99. *a.* it is held, That the heir shall be adjudged to take in course and nature of a descent, where neither right, title nor action, but only a use or possibility descended, that might upon the performance of the condition, have vested in the ancestor, and then the heir would have claimed by descent.

And it is laid down as a rule in *Sbelley's* case, That where the heir takes any thing, that might have vested in the ancestor, there, although it first vested in the heir, and never in the ancestor, yet the heir shall be esteemed in by descent.

Here is a right to the performance of this condition vested in the ancestor, a right by which the estate might possibly have vested in the ancestor, a right that might have been released by the ancestor, but not being released descends to the heir; and therefore the heir may be properly said to be in by descent, since the right to perform the condition, of which the vesting of the land is but a consequence, does descend to him.

The case of the feoffment in the *section* of *Littleton*, is parallel in all respects to the present case; parallel as to the condition, as to the performance, as to the effect of the performance, and differs only

Michaelmas Term 5 Geo. II M

as to the person who is to take advantage of the performance of it. Stat. of wills. And this is supplied by the statute of wills, which gives the third person as good a title to take advantage of it, as the feoffor had by the common law.

* P. 426.
2 Vern. 763,
S. C.

Difference in equity, when a debt by simple contract is turned into a debt of a superior nature by a judgment confessed by the testator, and when by the executor; the former shall have a preference according to law with respect to equitable assets, but not the latter.

* *Wilson and Fielding.* In Canc.

THE testator mortgaged his land for such a sum of money, and gave a bond for the performance of covenants comprised in the mortgage deed; and dies indebted to several persons by simple contract. The mortgagee gets a judgment upon this bond; and the executor pays a great part of this judgment out of the personal estate, by which means the assets proved insufficient to discharge the debt by simple contract.

A bill was therefore brought by the creditors against the heir, to oblige him to refund, out of what he had been eased in respect to the land descended to him, by the discharge of a great part of the mortgage debt out of the personal estate, as far as was necessary for the discharge of debts. And it was decreed accordingly that he should refund.

One of the creditors by simple contract had, after the death of the testator, by suit at law against the executor, turned his simple contract debt into a judgment debt. And the question was, Whether the money so decreed to be refunded, and which was called equitable assets, because it could not have been assets at all without the assistance of a Court of Equity, should be decreed to be refunded for the benefit of all the creditors equally; or for the advantage in the first place, of him that had turned his debt into a judgment debt? The executor and the rest of the creditors, had offered this judgment creditor, to be paid in equal proportion with the rest; but he refused, insisting upon his judgment.

In behalf of the rest of the creditors, it was insisted, That debts by simple contract, are in justice and conscience as much debts, as debts by bond or judgment. That therefore, according to the rule of equity, * That he who will have equity must do equity; if a judgment creditor stands in need of the assistance of a Court of Equity, to make *that* assets, which at law would not be assets; a Court of Equity will never give him this assistance, unless he will consent to come in equally with the rest of the creditors, who in conscience and equity have as just a demand as himself.

Thus if a man by will subjects his land to the payment of debts, the Court of Chancery always decrees, That all the creditors, without distinguishing what the nature of the debts are, whether simple contract, bond or judgment debts, shall be paid in equal proportion, out of the land thus subjected by will to the payment of debts.

* P. 427.
Maxim.

Michaelmas Term 5 Geo. I. M

It was urged by the counsel of the other side, That nothing was more common than bills brought for the discovery of assets; that if it should happen in this case, that bonds taken in trust for the testator should be discovered, it was never yet heard of, that a creditor should be told in this court, These bonds are assets in equity, and you shall not have the assistance of this court, to make them assets in law, unless you will quit the advantage the law gives you, wave the superiority of your debt, and be content to stand upon a level with the rest of the creditors.

Parker Lord Chancellor: The doctrine that seems be laid down by the counsel for the creditors, That there is this standing difference between assets in law, and assets in equity, That though the former shall go according to the course of administration prescribed by the law, yet the latter shall, without any regard to this, go among the creditors equally, however different the nature of their debts are, is a doctrine without any reason or foundation; and would establish a rule in equity, directly contrary to the known rules of law, as to the order in which debts are to be paid.

* Indeed, as to the case put of land devised by the testator to be sold for the payment of debts, it is so; and this court does always decree the profits arising from the sale, equally among all the creditors: But then this land may be considered as a gift of the testator among all his creditors; and as the testator, the donor, has not thought fit to make any distinction between his creditors, so this court, which is in nature of a trustee for the testator, will make none neither.

But generally speaking, there is no difference between assets in law, and assets in equity; but both must be distributed by the executor in a course of administration. Had therefore this judgment creditor, been in possession of his judgment at the time of the death of the testator, I would not have taken the benefit of his judgment from him; but would have decreed the refunding for his benefit in the first place.

But this not the case; this judgment is obtained against the executor, and whether voluntarily, does not appear, and it will be impossible for me to distinguish; it is enough that it may be voluntarily confessed by the executor, who has it by this means in his power to give a preference to a simple contract creditor, at any time, before a bond creditor, and so in reality overturn the course of administration. And though this at law may be done, so that had payment been made to this judgment creditor, there had been no remedy; yet a Court of Equity shall never be assisting to the enabling of an executor to the doing of it.

The money was therefore decreed to be refunded for the equal benefit of all the creditors.

No difference commonly between assets in law, and assets in equity; but both must be distributed in a course of administration.

Contra 2 Vern. 62.

* P. 428.

Yet where land is devised to be sold for the payment of debts, the profits arising from such sale shall be applied to the payment of all debts equally.

An executor has power at law by confessing judgment, to give the preference to what creditors he pleases; but equity shall never assist to the doing this, though it can give no relief if done and the money paid.

Hilary

Hilary Term

5 Geo. I. B. R.

Anonymus.

Habeas corpus
act.
Commitment
in that act
must be un-
derstood of a
commitment
either by a
justice of
peace, or se-
cretary of
state; not rule
of court.

THE *Habeas Corpus* act directs, That if a person committed for high treason or felony expressed in the *Warrant* of his commitment, shall make his prayer and petition in open court, the first week of the term or day of the sessions, to be brought to his trial, and shall not be indicted in the next term or sessions after such commitment, he shall be bailed, &c.

Now it was doubted, Whether persons committed by rule of court, are intitled to the benefit of this act? And it was resolved by two judges, viz. *Eyre* and *Fortescue*, (*absente Powys, dissentiente Pratt.*) That none are intitled to make their prayer, but such as are committed by a warrant of a justice of peace, or secretary of state, and not those committed by rule of court; for *that* is not, in the meaning of the act of parliament, a commitment by *Warrant*.

Easter

* Easter Term

* P. 439.

5 Geo. 1. B. R.

King and Parish of Burcleer.

Sett. Rem. 83.

BY the statute of 9 & 10 W. 3. cap. 11. it is enacted, That no person coming into a parish by certificate, shall have a legal settlement in the parish, unless he shall *bona fide* take a lease of a tenement of 10 l. per Annum; or shall be legally placed in, or execute some annual office in such parish.

Settlement. A copyhold of 20 s. per annum enjoyed by a certificate man in right of his wife, during her life, will make a settlement, notwithstanding 9 & 10 W. 3. cap. 11.

It was in this case debated, Whether a certificate man, who enjoyed a copyhold of 20 s. per Annum value, in right of his wife, during her life, which lasted five years after the descent of the copyhold upon her, did thereby gain a settlement; the statute being expressed That a certificate man shall not gain a settlement, unless by two ways, of which this is none.

Resolved by the court, That this was a settlement. For by the preamble of this act it is plain, That the meaning of it was to hinder and debar certificate men, from gaining settlements by some act pursuant, and consequential of this certificate; as that the certificate should not amount to a notice in writing, and so fall within the statute of 1 Jac. 2. cap. 17, &c.

* P. 431. Stat. 1 Jac. 2. cap. 17.

It was said, That this construction was parallel to that which had been made upon the statute of 13 & 14 Car. 2. cap. 12. whereby any poor person coming to settle on a tenement under ten pounds, is removeable by two justices within forty days after his coming. And yet resolved, That a person coming to reside upon his own estate, though under ten pounds, was not within the statute, nor removeable within the forty days; for that neither this, nor any other act of parliament did design to debar a man from coming to look after and improve his own estate; and whenever a person comes to his own estate, it was said that such a person was unremoveable, *i. e.* settled.

Stat. 13 & 14 Car. 2. cap. 12.

Easter Term 5 Geo. I.

Anonymus *In Canc.*

Motion to
have a bill
taken pro
confesso.

A Defendant refusing to answer, and standing out all contempts, until an order was made for a sequestration, it was prayed by the plaintiff's counsel, That the bill might be taken *pro confesso*. To which it was objected by the counsel on the other side, that this could not be done; because the sequestration was neither under seal, nor executed; and also because the plaintiff did not produce the original itself, but only a copy of it.

Lord Chancellor *Parker*: Last objection certainly a good one. But as for the other, there seems to me, to be no reason for it; for the putting the seal to the sequestration, and actually executing it, seems to be then only necessary, when the plaintiff is not ripe for a decree upon his own bill; but wants some discovery from the defendant's answer, upon which the decree may be founded: And therefore the actual executing a sequestration, to extort an answer, of which the plaintiff has no occasion, seems to me very unnecessary.

Atkin and Berwick. *B. R.*

Fort. 393.
Stra. 165.
Bankruptcy.
Whether
goods deli-
vered antee-
dent to an act
of bankruptcy,
but accepted
subsequent,
were bound
by the bank-
ruptcy?

A. And **B.** living in two very remote parts of the kingdom, and having dealings one with another, in way of trade; **A.** sends up to **B.** a quantity of goods, **B.** apprehensive that he should soon become a bankrupt, and not thinking it reasonable, that these goods should go to the payment of other creditors, delivers a quantity of goods, being the greatest part of them the very individual goods, that he had before received of **A.** into the hands of **C.** for the use of **A.** **B.** subsequent to the delivery, and precedent to the acceptance of them by **A.** becomes a bankrupt.

And the question was, Whether these goods were not so absolutely vested in **A.** and become his property, by the delivery of them to **C.** for his use, as not to be subject to the disposal of the commissioners of bankruptcy.

And upon this appearing by evidence at the trial to be the case, it was stated by the direction of *Parker* chief justice, who tried the cause, for the opinion of the court; who all delivered their opinion *seriatim* this term, that the property of the goods was so vested in **A.** by the delivery of the goods to **C.** for the use of **A.** that they were not subject to the disposal of the commissioners of bankruptcy.

Chief

Easter Term 5 Geo. I.

Chief Justice *Pratt* grounded himself pretty much upon the authority of the case of *Butler and Baker*.

Judge *Fortescue* mentioned the argument of Judge *Ventris* in the case of *Thompson and Leach*, (upon the * reasons of which the judgment in the House of Lords was given) as a storehouse of law proper to this head. * P. 433.

Cases quoted in the argument were, 2 *Cra.* 680, 687. 1 *Bullstrode* 68. 3 *Cro.* 26. 4 *Rolls's Abr.* 32. p. 13. *Helverton* 164. *Cro. Jac.* 667. *Dyer* 49. 2 *Rolls's Rep.* 39. 2 *Leon.* fol. 30. *Clerk's case*.

Butler and Duncomb. In Canc.

Eq. Abr. 339.
pl. 6.
2 Vern. 760.

LAND is by marriage articles settled upon husband and wife, for term of their lives, and after the death of the longest liver of them, then to trustees for the term of 500 years; which term is declared to be in trust, for the raising, after the commencement of the term, a portion of 3000 l. for daughters, payable at the age of 21, or marriage, which should first happen; remainder to issue in tail-male, &c. husband dies, leaving issue a daughter, and no son; the daughter married during the life of the mother.

Land settled upon husband and wife for their lives and the longest liver of them, then to trustees for a term of years, which term was in

trust for raising, after the commencement of the term, a portion of 3000 l. payable as 21 or marriage. Husband dies, leaving issue a daughter, who marries, living the mother. Decreed, That the portion should not be raised by sale or mortgage of the term, living the mother, by reason of those words, after the commencement, &c.

The daughter and her husband bring their bill to have the portion raised immediately by sale or mortgage of the term, during the life of the mother; it being insisted upon, That cases had very frequently happened in this court, where in favour of provision for children, terms had been sold in the life of the parents, by the decree of this court; which seems the more reasonable here, because it is made expressly payable, at the age of 21. or day of marriage, which should first happen; which words seem to be useless, as the case has now fallen out, the daughter marrying before the death of the mother, unless the portion might be raised by sale or mortgage of the future term.

* Decreed by Lord Chancellor *Parker*, upon great deliberation * P. 434. of the case, That the daughter when married, had a present right or interest vested in her, that should descend to her executors or administrators; but that it was a right to a portion to be raised after the commencement of a term, that could not take place, until after the death of the mother.

The

Easter Term 5 Geo. I.

The reasons of his resolution were, That he did not much approve of selling of future terms, during the life of both or either of the parents; and was it *Res integra*, he should with great difficulty admit of it. He looked upon the care taken in many settlements of late to prevent this, as so many protestations against the reasonableness of this sort of decrees.

As for the cases of this nature; he said there were several, upon which, if he had time, he could raise observations pertinent to the present question: But he would only say this in general, That there was not one of them, that came up to this present case, which is to have a portion raised before the commencement of a term, when the settlement is express, that it is to be raised after.

In marriage settlements it is not only to be considered, what is to be wished, but what the estate will bear.

That the words, to be raised *after* the commencement of the term, did import as strongly the negative, that it was not to be raised *before*, as the raising 3000 *l.* imports that no more shall be raised.

According to this construction, all the words of the settlement are satisfied; even the words *payable at the age of 21. or day of marriage*, &c. are not useless, even as this case has happened; for they serve to give the daughter a present right and interest (which is descendible) to a portion, to be raised indeed hereafter.

* P. 435.

As to the time of the commencement of the term, that is so plainly fixed to the death of the mother, as that it will admit of no proof, for want of a clearer *Medium* to prove it by. And though a term may possibly, in some particular cases, begin in equity, before it does in law; yet certainly it cannot here, where the mother is entitled to the perception of the profits, until the commencement of the term.

But the Chancellor would not give the defendant costs, because the matter was somewhat doubtful.

Trinity

Trinity Term

* P. 436.

5 Geo. 1. Cur. Canc.

*Case upon marriage settlement of Sir John Trevor,
late Master of the Rolls.*

9 Mod. 161.
Eq. Abr. 387.
Pl. 7.

Trust.
Marriage
settlement

SIR John Trevor did by marriage articles oblige himself, within two years after his marriage, to settle such and such lands, to the use of himself for life, then to the use of his wife for life, and then to the use of the heirs males of that marriage, and the heirs males of such heirs males. It was also covenanted by the articles, That he should stand seised of these lands, to the uses aforesaid, and such other uses as should be declared by the trustees therein named, until such settlement should be made. Sir John Trevor had issue several sons by that marriage. He levies a fine of these lands, but does not declare to what uses the fine should be levied; but several years after, he by deed declares the uses of the aforesaid fine in favour of his second son, and dies, without ever making any settlement pursuant to the articles, and left a very considerable estate to descend upon the eldest son not mentioned in the articles.

* A bill is brought by the eldest son to have the fine set aside, and the lands comprised in the articles, conveyed as therein mentioned. * P. 437.

It was insisted in favour of the defendant, the second son,

1st, That in case a settlement had been literally made according to the articles, then by operation of law, according to *Shelley's case*, an estate-tail would have been vested in Sir John Trevor; and consequently he would have been able to have done what he has now done, viz. levied a fine, and barred the issue.

2^{dly}, It was urged, that the covenant to stand seised, &c. was in law a conveyance executed, and did actually vest an estate-tail in Sir John Trevor; and consequently the fine was well levied.

Trinity Term 5 Geo. I.

3dly, It was urged, that if in respect to those lands agreed by the articles to be settled, the eldest son had any injustice done him, so as to entitle him to relief in a court of equity, his father had made him an abundant satisfaction or compensation for it, by permitting an estate not affected by the articles, and of greater value, to descend upon him, when he might have given it from him.

Whereby marriage articles a settlement is to be made, chancery will order one not according to the letter, but intent of the articles.

Parker Lord Chancellor decreed in favour of the eldest son: He said that this case was in effect, no more than what was very common in chancery, to decree such a conveyance, as was, tho' not according to the words of the articles, yet according to the intention of them, by taking care that the husband should be made only tenant for life, and so not have it in his power to defeat the intention of the settlement.

2 Vern. 671.

Marriage articles not performed, considered as if they were, in equity.

That the articles were but minutes of the settlement; and therefore not necessary to be verbally pursued. That what the court, if applied to, would have decreed, they would so far consider performed, as to set aside the fine.

* P. 438.

As to the 2d point; he looked upon the covenant to stand seized, as what was designed to supply any defect in the conveyance, and not as an execution of the articles.

As to the 3d point; there might have been some thing more to have been said for it, if the articles had been to settle land generally, and not such and such lands in particular, naming them.

This decree was affirmed in the House of lords. See 2 Mod. Cases in law and equity 161.

Hancock ver. Hancock. In Canc.

Bond fraudulently obtained.

HANCOCK had issue two sons; the one married a daughter of *Dalswell*, the other being the youngest, having made his addresses to a lady, and all things being adjusted and concluded upon for the wedding, *Dalswell* took the young gentleman aside, showed him a bond ready drawn, which as he said was prepared by the direction of his father, and told him, that unless he would execute it, his father would not suffer the match to proceed; and moreover, that he must not so much as mention any thing relating to this bond, as he valued his father's displeasure.

The condition of this bond was, that if he should die without issue by that marriage, he would leave 3000 £. to one or more of the children of the elder brother, who had married this daughter of *Dalswell*.

The young gentleman under this terror executes the bond.

Trinity Term 5 Geo. I.

Afterwards he spoke to his father of it, who denied that he ever gave such directions, and gave him 3000 *l.* to indemnify him against the bond, which 3000 *l.* was, when this bond should be delivered up to him, to be distributed among the grandchildren. The father dies; the second son in his life-time, and by his will, gave * in land and money more than 3000 *l.* to one of the children of his elder brother, and dies without issue. The only evidence of the manner by which this bond was extorted, was a recital in the will of the second son. It was proved in the cause, that when the younger brother was making these gifts, in favour of his elder brother's son, he was advised to declare, that this was in satisfaction of the bond; but his answer was, that this would look like complying with a bond which he had all along declared had been unjustly extorted from him. This bond was of fifty years standing. * P. 439.

Lord chancellor *Parker*: I make no doubt but this bond was fraudulently extorted; but I know not how to come at it; for to allow a recital in the will of the obligor, as evidence to overthrow a bond, may be a thing of dangerous consequence. However I think the bond has been satisfied; and the reason given why he would not declare it to be in satisfaction, does very plainly amount to a declaration of his intention, that he did not design to make the gifts he did, over and above the satisfying his bond.

Agill and Hunt. B. R.

PROCESS in spiritual court for calling a woman whose in *London*; after sentence the court of *B. R.* was moved for a prohibition. Motion for a prohibition.

But the prohibition was refused; for said by the court, that it was a known rule laid down in books, that where it does appear upon the face of the libel, that the matter is of temporal and not spiritual cognizance, there a prohibition may be granted after sentence; *When prohibition may be moved for after sentence, and when not.* *contra* where it does not appear; for there it must be taken advantage of before sentence. Now here the offence in the libel, is certainly a matter of spiritual cognizance; and tho' it does appear in the libel, that * the words were spoken in *London*, yet that would not take away the jurisdiction of the spiritual court, were it not for a particular custom, by virtue of which those words are punishable in *London*: But this being a particular custom, the court can no more judicially take notice of it, than they can of any other custom of the city of *London*; and if a cause be removed out of the city courts by *habeas corpus*, the custom must be returned, or no *procedendo* can ever be granted. * P. 440.

Dr.

Trinity Term 5 Geo. I.

Dr. Bows *versus* Jurat. B. R.

Motion for a prohibition.

DR. Bows, Vicar of New Romney, brought a libel in the spiritual court against the defendant one of his parishioners, for *Easter* offerings; suggesting that they had time out of mind used to be paid in that parish.

The defendant made no defence at all in the spiritual court; but after sentence against him, moves the court of B. R. for a prohibition; the motion was granted *nisi*.

The reason why the court doubted, Whether the prohibition was to be granted or not, was their ignorance of the practice of the spiritual court. For the court seemed clearly of opinion, that if the practice of the spiritual court was agreeable to *that* of the courts at law, viz. to take every thing *pro confesso* against a defendant that makes no defence, and so give sentence for the plaintiff without obliging him to prove the truth of his case, then the prohibition was not to be granted; because the custom set forth by the plaintiff was not denied by the defendant, and consequently no occasion for trial of the custom. But in case the practice of the spiritual court, was, not to give sentence for the plaintiff, even in case of no defence made by a defendant, without proof made to the court by the plaintiff of the truth of his case, that * then a prohibition was to be granted; because then the sentence of the spiritual court was founded plainly upon proof made before them of a *custom*, which is not to be permitted, because the proof required by them is very different from *that* required by the common law.

* P. 441.

Dr. Pinfold, who spoke against the prohibition, ingenuously owned, that it was the practice of the spiritual court to require proof. However the court took time to consider, and would not make the rule absolute.

Uphill and Halsey. In Canc.

Devise of personal estate.

THE clause of the will upon which this case turned, was this:

I make my wife whole and sole executrix of all my personal estate; and my will is, That such part of my personal estate, as she shall leave of her subsistence, shall return to my sister.

The interest of the personal estate was not sufficient to maintain the wife. The wife after marries; and the dispute was between the second husband of the wife, and the sister of the first husband.

Sir

Trinity Term 5 Geo. I.

Sir Joseph Jekyll, Master of the Rolls, before whom the cause was heard, gave it in favour of the sister.

He said, That such a sense, if possible, ought to be put upon a will, as is agreeable to the intention of the party, and consistent with the rules of law. And such a one he thought this will was capable of; for he understood it thus: *I devise the use of my personal estate to my wife, for her life, with a power* (the interest not being sufficient for her maintenance) *to dispose of as much of the principal, as shall be necessary for her subsistence*; and his sister to have the residue.

He thought no stress was to be laid upon those words *All my personal estate*; for *that* is no more than what the law implies; for when a person is made executor, * the law vests all the personal * P. 442. estate in him. But then it is true, that this gift, that by construction of law is absolute, may be qualified by the declared intention of the testator. Here it is restrained to her for her life; but with a power indeed, to dispose of so much of the principal, as shall be necessary to her subsistence, over and above the interest.

An account was accordingly decreed to be taken, with directions suited to this construction of the will.

Farrington and Knightly. In Canc.

THE testator made two executors to his will, and gave each of them a legacy of 50 l. a-piece. He gave legacies likewise to all, or most of his relations; and then there being a surplus of the estate, to the amount of about 1200 l. unexhausted by debts and legacies, the question was how this surplus should go, whether according to the statute of distributions, or to the executors.

J. R.
Pre. Ch. 566. v. 1. P. 87. 544.
Question,
Whether the
gift of a le-
gacy should
cut an execu-
tor off from
the residuum
undisposed of
by will?

Lord Chancellor *Parker*: There are several ancient laws, by which the estate of an intestate, was made distributable, in a manner, as it is now by the statute of *Car. 2*. So that this law is in reality but declaratory of what the old law was; and yet, (which is very strange) before that statute, the temporal courts were used to prohibit the spiritual court, when they went about to compel the party to make a distribution, in conformity to those laws.

As to the present case; it is more material, it may be, that the law should be settled and known, than which way it is settled.

The very examination of witnesses in the case of *Littlebury* and *Buckley*, is a plain proof, that the law is in this point very unsettled. 2 Vern. 674.

* It may perhaps be of mischievous consequence to overthrow the * P. 443. authority of the case of *Foster* and *Mount*, and the subsequent resolutions founded upon the authority of *that*. Tho' highly probable, 2 Vern. 676. that if in the case of *Foster* and *Mount*, the surplus had been less con-

siderable,

Trinity Term 5 Geo. I.

considerable, the resolution would have been otherwise; but the executor being an attorney, and a stranger to the testator, and the surplus very considerable, it seemed to be a very gross absurdity to suppose, that the testator could ever intend to give away so very considerable a surplus, from his relations, to such an executor.

He further observed that this will carried with it, the suspicion of being unfinished and incomplete, for want of the usual conclusion, *In witness whereof I have put my hand and seal*; a very strong circumstance to induce a belief, that this surplus was never designed for the executors.

He took further time to consider of his decree.

Anonymus. B. R.

Sci. Fa. upon
a recogni-
zance.

SCIRE *facias* in the court of C. B. upon a recognizance taken in an action of debt; judgment *pro quer.* and error brought.

Insisted in behalf of the plaintiff in error, that the breach was not well assigned: For tho' it be a general rule, that a breach assigned in the very words of the condition, is a good assignment; yet that rule does not hold, where the words are by law interpreted contrary to their natural signification, which is the case here. For the words of the condition are, that he should render himself in execution of the judgment; which words in their natural sense, import an act, that it is impossible for the bail to do, for it is the principal only that can render himself in execution of the judgment; so that the meaning of the words in * this case must be, to render himself in order to execution. And therefore the pleading should not have been in the very words of the condition; but in such words as are expressive of that sense, that the words of the condition are, by operation of law, to be understood in.

* P. 444.

If there are two joint-tenants, and the one by deed grants all his estate to his companion, this will in operation of law be understood and expounded as a release, *that* being the proper conveyance in law from one joint-tenant to another. But if the party had in this case pleaded *quod concessit*, it had been naught; for tho' in a deed, rather than it should be void, it shall be expounded a release, it is not so in pleading, where words must be always understood in a strict and proper sense. 2 *Saunders* 97.

This objection was over-ruled by the court, who were all of opinion, that the words in the pleading must be understood in the same sense, as when used in the condition of the recognizance.

Then it was urged for the plaintiff in error, that there were variances between the *scire facias* and the recognizance.

The

Trinity Term 5 Geo. 1.

The counsel for the defendant acknowledged that there were variances, and material ones; but insisted, that the plaintiff could not now take advantage of them; because he had not by demanding oyer of the recognizance in the court below, made it part of the record, and so brought it before this court; and that as it stands now, the recognizance is no part of the record. *Salkeld* 262, 264. 1 *Rolle's Abr.* 760. pl. 1, 2.

And the court being of this opinion, they gave judgment *nisi, pro def.* in error.

* Michaelmas Term

* P. 445.

6 Geo. 1. In Cur. Canc.

Turton *versus* Benson.

MRS. *Turton* a widow, being possessed of an estate in land, as her jointure, to the value of 400*l.* *per annum*, and having a son at the age of 22, and a barrister at law, entered into a treaty of marriage for her son, with Mr. *Benson*. The agreement was, that Mr. *Benson* should give with his daughter a portion of 3000*l.* and in consideration of this fortune, Mrs. *Turton* agreed to settle immediately the 400*l.* *per annum*, which she had an interest in for her life, as her jointure, upon her son; and 300*l.* *per annum* of this very land, was to be settled upon Mr. *Benson's* daughter, as a jointure proportionable to her fortune. When all things were thus agreed upon, and the affections of the young people engaged, *Benson* the father of the young lady, takes *Turton* the son aside, and tells him

This case was heard at the rolls in Michaelmas 1718, and the same decree given.

See 2 Vern. 764. 11. Stra. 240.

Private agreements on marriage, derogatory and contradictory to that which is open and publick, relieved against.

S. L. also in Res. in Cha. 522. 1. P. W. 196.

Michaelmas Term 6 Geo. I.

him that his circumstances would not allow him to give 3000*l.* with his daughter, however he would do his utmost, *viz.* give him 2000*l.* and let him have the other 1000*l.* without interest for seven years; but that he must give a bond for the re-payment of this 1000*l.* at the end * of seven years; and that unless he complied with this, the match should not go on. *Turton* rather than the match should be broken off, gives the bond. Afterwards a settlement, to which Mrs. *Turton* the mother, was one of the parties, was prepared and executed, in pursuance of the agreement, and expressly mentioned to be made in consideration of a portion of 3000*l.* and Mrs. *Turton* actually quitted to her son, the interest she had for her life, knowing nothing of this bond; and the marriage took effect.

Mr. *Benson* owed Sir *Theodore Jansen* a considerable sum, for which he and his son were both bound; but Sir *Theodore* not satisfied with this, procured from Mr. *Benson* the father, an assignment of this bond thus procured from *Turton* the son-in-law, as a collateral security for his debt.

Benson the father four years after the marriage dies, very considerably indebted to Sir *Theodore*, Mrs. *Richardson* and others, both by bond and simple contract.

Assets left sufficient to pay the bond debts; but not the debts by simple contract.

Mrs. *Benson* the widow takes out administration. The debt to Sir *Theodore* was immediately discharged; the son being bound for it as well as the father.

Afterwards the administratrix and the son, enter into a deed of composition with Mrs. *Richardson*, and the major part of the creditors. By this deed of composition it was agreed, that the administratrix should pay small debts of a trifling nature, as servants wages, &c. to the value of about 200*l.* that an office the father had purchased for the son, should be sold, and the profits arising from the sale should be assets; that all the creditors, parties to this deed, should be paid in equal proportion out of the assets, without regard to the nature of their debts, whether bond or simple contract.

That the administratrix should do her endeavour, to get in all the debts standing out; and that the * administratrix should not be sued or molested by any of the creditors, parties to this agreement.

Whatever should be hereafter got in or recovered of the debts standing out, was to be equally divided among the creditors.

It was proved in the cause, that Mrs. *Richardson* hearing that this bond was to be assigned to her, went to Mr. *Turton*, to talk with him about it; and that Mr. *Turton* told her, that if he had to do with the family of the *Bensons*, he would never pay the bond, for he had, he was sure, law of his side; but if it was to be assigned to her he would not dispute it. This discourse was about six weeks before the deed of composition; but was positively denied by *Turton* in his answer.

The

Michaelmas Term 6 Geo. I.

The question was, whether *Turton*, the seven years being expired, should be obliged to pay this 1000 *l.* for which the bond was given, to the creditors of Mr. *Benson*.

There were several authorities produced to shew, that bonds of this nature had been relieved against in equity.

Kemp and Coleman, 1 *Salkeld* 156. Laid down as a rule in equity, that where the son, without the privity of father or parent, during the treaty of the match, gives a bond to return, or refund any part of the portion, such bond is void.

Lord *Hamilton* and Lord *Mobun*, 1 *Salkeld* 158. One of the covenants was, that the intended husband should within two days after the marriage release to the guardian of the young lady, all accounts of the mesne profits of an estate belonging to her.

Lord *Cowper* held this covenant void, admitting it obtained neither by surprise nor fraud, because it was for the private benefit of the guardian; and compared this sort of contracts to brokerage bonds, but thought them * of a more mischievous consequence; and the rule * P. 448. mentioned in the former case was again laid down.

Goldsmith and Bunning. A note for payment of so much money was given to a maid servant, in consideration of the endeavours she was to use for the procuring such a match. The maid servant marries one that knew nothing of the consideration of the note, but was induced to have her upon account of the money he thought her entitled to by the note; so that he might be looked upon as a purchaser of this note for a valuable consideration, without notice of the reason for which this note was given; and yet the note was set aside.

Lamlee versus Hayman & ux 1705. A mother agreed to part ^{2 Vern. 466,} with her jointure, for the advancement of her son in marriage; but ^{499.} took a private security from her son, to assign over to her, immediately after the marriage, a leasehold estate, that the son was entitled to, and possessed of as his own. This agreement set aside in equity.

Peyton and Blaidwell, May 9, 1684. *Blaidwell* upon the mar- ^{2 Vern. 500.}riage of his kinsman, agreed to settle upon him such an estate in possession, and such in reversion; but entered into a private agreement with the kinsman, that after the marriage took effect, he should redemise, &c. This agreement was set aside in equity, and *Blaidwell* forced to account for the mesne profits of what was thus redemised, in pursuance of the private agreement.

Sloan and Fowler. *Fowler* the father told his son, he would not give his consent to his marriage with *Sloan's* daughter, except he would enter into bond to pay him such a sum of money, as he said he wanted for a provision for his younger children; upon which the son, rather than the match should go off, gave his father his bond for the sum required. And this bond the son was relieved against, upon a bill brought by himself and his father-in-law

Michaelmas Term 6 Geo. IV.

* P. 449. * The counsel for the creditors insisted much upon the age and profession of *Turton*, the one 22. the other a barrister at law; but they seemed to own, That with respect to the administratrix of Mr. *Benson*, they should have had a hard case of it; but that now it being against creditors, *that* would distinguish this case from the rest of the cases cited.

They insisted upon the assignment of this bond to Sir *Theodore*, upon the acquiescence of *Turton*, during the life of Mr. *Benson*, which was four years after the match; and upon the discourse that passed between *Turton* and *Richardson*, which was an inducement to her to come into this composition.

The case of *Ellis* and *Warner*, in 2 Cro. was cited, where an usurious contract was held good, in favour of an innocent person.

2 Vern. 564, 565, 566. The counsel for *Turton* in their reply, quoted the case of *Taylor* and *Wheeler*, 2 Salkeld 449. to shew That an assignee could not be in a better condition than the bankrupt; from whence it was inferred by parity of reason, That the creditors in the present case, could not be in a better condition than Mr. *Benson*, or his administratrix.

Lord Chancellor *Parker*: All agreements of this nature odious, and have as constantly been set aside by this court, as they have been brought before it, even in favour of those very persons that were parties to the agreement.

In this case there are plainly two agreements; the one open and above-board, the other secret and private, and derogatory of the former: By the first the fortune is 3000 l. by the latter it is reduced to two; and this plainly to the deceit of the mother, a party to the settlement, who upon consideration of this fortune, * actually quit-
ted her jointure, in order to make this settlement.

* P. 450.

A bond when assigned, must remain liable to the same equity as before.

2 Vern. 692.

And if this bond be naught *quoad Benson*, no assignment of his can make it good. For if it should, there is an end at once of the jurisdiction of this court over frauds; for then no matter how vicious and fraudulent the agreement be; make but an assignment, and *that* will cure all.

When bonds are assigned, the meaning is, That the assignee is to have all equitable advantages, that the assignor could have had.

Suppose a bond is assigned, upon which both principal and interest are discharged, Shall the assignee recover the penalty, which the obligee had no right to?

I do not say this bond is so void, as that no subsequent agreement, upon good consideration, could make it valid. But nothing like this in the present case,

Michaelmas Term 6 Geo. I.

As for Sir *Theodore* and the assignment to him; his debt being paid, he is entirely out of the case.

As to the deed of composition, as it is called, between the administratrix, and the creditors; nothing in it to influence this case, nor can there in the nature of it be found so much as one reason, drawn from this bond, to induce them to enter into it.

It is only an agreement made between the creditors, for preventing the wasting of the assets in law expences, and restraining the administratrix from giving that preference to debts, that by law she might. As for *Turton's* promise to Mrs. *Richardson*, if true, (for positively denied by *Turton*) how far in honour it may bind him, is nothing to me. It was a promise, made upon supposition of an assignment, that was never made: nor can she be supposed to become a party to this agreement upon account of this promise.

The making of the profits arising from the sale of the office assets, the preference the administratrix might have given to other debts, had she refused, are plain and good reasons for her to come into it. Creditors are, it is true, intitled to favour; but this is only with respect to the estate of the debtor. P. 451.

Blunden and Barker. In Canc.

THE bill was brought by Mr. *Blunden* in right of his wife, daughter of *Ibbot* the testator, and by the widow of the said testator, against Mrs. *Barker*, the other daughter of *Ibbot*, and administratrix with the will annexed, to have a discovery of the estate of the deceased Mr. *Ibbot*, and to have the will set aside, as far as it was prejudicial to the right of his wife, as a daughter of a citizen of London; or to the right of the widow, as wife of a citizen.

Of the custom of London with respect to the estates of freemen.

Upon the pleadings, the case came out thus:

Ibbot the testator had by his first wife issue, *Anne Barker* the defendant; and by the second, (his present widow, one of the plaintiffs,) *Esther Blunden* married to the plaintiff, against the consent of the father. Upon the marriage of Mr. *Ibbot* the testator, with his second wife, now widow, there were articles of agreement precedent to the marriage, entered into by Mr. *Ibbot* and the present widow. The substance of which articles were, That Mr. *Ibbot* should leave her at his death, an estate in land for her life of 85 l. per Annum, 400 l. in money, and all her jewels; and that she should enter into a bond of 3000 l. penalty, in trust for Mr. *Ibbot*, the condition of which bond was, That if these terms were made good to her, she would, within two months after the death of Mr. *Ibbot*, release to his executors all right and title, that she might have to any part of his estate real or personal, by dower, custom of London,

or

Michaelmas Term 6 Geo. I.

or otherwise. The bond was entered into accordingly ; and in 1684. the match took effect.

* P. 452. * In the year 1706. Mr. *Ibbot* married his eldest daughter Mrs. *Barker*, and gave her for her portion, as appeared by the marriage settlement, 4000 *l* in money, besides lands and tenements (amongst which there was the reversionary interest of a lease) to a considerable value. To this settlement, among others, Mr. *Ibbot* the father was a party ; and the certainty of Mrs. *Barker*'s advancement appeared no otherwise, than by the father's being a party to this settlement, wherein no value was put either upon the freehold estate, or the reversionary interest of a lease settled upon her.

But precedent to the marriage, the father thought fit that Mrs. *Barker* his daughter should before her marriage execute to him a release, to which the lawyer that drew the settlement, and Mr. *Barker* the intended husband should be parties ; wherein his daughter should, in consideration of her present advancement, release to her father, his executors and administrators, all interest, right and title, &c. that she had or should have to any part of his estate, real or personal, by custom of the city, statute of distributions, or otherwise ; save what her father should please to give her by his last will. And this release was accordingly executed. Mrs. *Barker* before this, had some small matter in land and money left her by other relations, the interest and profits of which were received by the father ; but no account was ever made up between them.

Some time after this, Mr. *Blunden* the plaintiff marries the other daughter of the testator *Ibbot*, without his consent.

Afterwards Mr. *Ibbot* makes his will, which as far as is material to this dispute, was to this purpose :

* P. 453. He gives to his wife during her life, the interest of so much *Bank* and *East-India* stock, as amounted to 1200 *l*. per *Annum*. He gives his two grandchildren by * Mrs. *Barker*, 5000 *l*. a-piece ; then he gives a leasehold estate in trust for Mr. *Blunden*, during the life of his wife, and after her decease, in trust for the children of Mrs. *Blunden*, and in default of such, in trust for his own right heirs. He gives all his real estate to Mrs. *Barker* ; and likewise makes her residuary legatee of all his personal estate.

Ibbot dies, leaving a very considerable estate, both real and personal.

The points in this cause were three.

1st, Whether Mrs. *Ibbot* the widow, be barred by the articles of agreement and the bond, from claiming her customary share ?

2^{dly}, If she be barred, what is to be done with her customary share ? viz. Whether the husband is to be considered as dying without

Michaelmas Term 6 Geo. I.

out a wife? And so the estate is to be divided into two moieties; the one moiety to go among the children, the other moiety to be the testamentary part of the testator. Or whether this agreement by which the wife is barred, being founded upon the consideration of a settlement upon her of a real estate, Mr. *Ibbot* should not be considered as a purchaser of his wife's third, and so have a right to dispose of two thirds of his estate by will?

3dly, Whether Mrs. *Barker* is in this case barred from claiming her customary share? Either upon account, *first*, of the release executed to her father; or *secondly*, for want of a sufficient certainty of her advancement appearing under the hand of the father.

In case the widow is barred, and the husband is to be considered as a purchaser, and Mrs. *Barker* is barred, Mr. *Blunden* in right of his wife, will be intitled to one third of the personal estate of the testator.

In case the widow is barred, Mrs. *Barker* barred, and the husband is to be considered, not as a purchaser, but as dying without a wife, then Mr. *Blunden* in right of his wife, has a clear title to a moiety.

* But in case the wife is barred, and the husband is to be considered as a purchaser, and Mrs. *Barker* not barred, then will Mr. *Blunden*, in right of his Lady, be intitled only to a moiety of the third part of the personal estate of the testator. P. 454.

This cause coming to a hearing before Sir *Joseph Jekyll* Master of the Rolls, he was pleased to decree, 1st, That the wife was barred: But what the consequence of *that* was, Whether the husband was to be considered as dying without a wife; or whether, in regard the wife was compounded off by the settlement of a real estate, the husband was to be considered as a purchaser of his wife's third, he sent to the city to be certified what their custom was.

2dly, He decreed Mrs. *Barker* barred, both by the release, as a subsisting agreement in equity; and also because there was not such a certainty appearing under the hand of the father, as the custom of the city required to let her in to claim her share. And consequently he was of opinion, That Mr. *Blunden* had in all events, in right of his wife, a title to one third; but in case by the custom of the city, Mr. *Ibbot* was to be esteemed as dying without a wife, then to one entire moiety of the personal estate of the testator.

Mrs. *Barker* not acquiescing under the determination of the Master of the Rolls, the cause was again brought on before *Parker* Lord Chancellor.

In support of the decree of the Master, and in favour of Mr. *Blunden*, it was insisted upon, That the wife may by an agreement before marriage bar herself of her customary share; and that when

Michaelmas Term 6 Geo. I.

this is done, the husband is always considered as dying without a wife; and no difference made when the estate, by which the wife is thus compounded off, is real, and when personal. In the case of ^{2 Vern. 665,} *Hancock and Hancock*, the wife was barred by a jointure of land; and yet held expressly, That the * estate should be divided into moieties. In the case of *Rawlinson and Rawlinson*, the wife was compounded off out of a real estate; and yet held That the husband should have a moiety for his testamentary share.

^{2 Vern. 666.} In the case of *Clare and Acmooty*, the children were all advanced in full; and it was held That in that case the father was to be considered as dying without children, and the estate was to be divided into moieties, the one moiety to go to the wife, the other to be the testamentary share of the father; and not at all considered, what the nature of the estate was, whether real or personal, out of which the children were advanced.

It was urged, That as to the bond given by the wife, though in law, it can bind no further than the penalty; yet in equity, the bond and articles make but one agreement: And therefore not in the liberty of the wife, by incurring the penalty of the bond, to free herself from the agreement.

As to the release given by Mrs. *Barker*; it was acknowledged, That at law, as a release, it would be void; but it was urged, That it would subsist as a good agreement in a court of equity.

It was urged, That if a jointure made precedent to marriage, could bar a woman of her dower; and that if a woman could, by an agreement precedent to marriage, bar herself of her customary share; in neither of which cases the woman has so much as an inchoate right at the time of the bar: *a fortiori* may a daughter release that right which as a right, is already by her birth vested in her, though not to take effect in possession until the death of the father.

As to the objection, That if the father be allowed to take releases from his children, it will leave room for the father to impose upon his children, by that authority that a father has naturally over his child: It was answered, That this was not the case *here*; the * ^{P. 456.} advancement was a very handsome and a very considerable one; and the intended husband and the lawyer that drew the settlement were witnesses to the release. Besides, if fathers cannot take releases from their children, some way or other, it will be a discouragement to fathers from advancing children in their life-time. And in the last place, the father has it in his power, as the custom now stands, to cut off his children from their customary share; for it is but to give them some inconsiderable advancement, and take care not to let it appear under his hand what the advancement was, and the thing is done; it having been settled in the case of *Fowk and Edwin*, That an advancement in marriage will cut a child off, provided the certainty

Michaelmas Term 6 Geo. I.

certainty of that advancement does not appear under the hand of the father. Upon all these accounts it was inferred, That the objection taken against these releases, from the power it would give parents to impose upon their children, had very little in it.

As to the certainty it was urged, That the decree of the Master was right; first, because the father being indebted to the daughter, for interest of money, and profits of land by him received at the time of this release, and this account having been never adjusted, it was now utterly impossible to do it; and consequently impossible to know the certainty of that advancement, which was the remainder after the debt deducted.

Another reason of the uncertainty of the advancement was, because no value was put upon the reversionary interest of the lease, nor of the freehold lands in the settlement.

It had been very easy for the father, to have put a value upon these things; but it seems to have been omitted on purpose to corroborate the release, That upon supposition the release should not prove effectual for the cutting her off, the uncertainty of the advancement in this settlement might.

* If it should be said, That *Id certum est quod certum reddi potest*; * P. 457. and that this advancement, how uncertain soever it be upon the settlement, is yet capable of being reduced to a certainty:

It may be answered, That it is true it may so; viz. by the chargeable and dilatory way of either a trial at law before a jury, or by an account before a Master; but this is not such a certainty as the custom requires, which on purpose to avoid these inconveniencies, has fixed and prescribed the way, by which this certainty is to appear, viz. the hand of the father. If this were not so, the custom as to the certainty would signify just nothing; for there is nothing but may some such way be reduced to a legal certainty.

If it be objected, That the custom not extending to land, the uncertainty of the freehold estate is not material: The answer is, That though the custom does not extend to land, yet the real estate as well as the personal, making part of the consideration, upon which this release was given; it seems not reasonable, That she should be released from the agreement, and yet retain so material a part of the consideration of this agreement. This falls in with the equity of the cases of jointures, *where* held, That though a jointure after marriage, in consideration the woman shall quit her dower, will not bind her from claiming her dower; yet equity will interpose, hold her to her election, and not let her have both.

In the case of *Atkins and Waterston*, a citizen of *London* jointures his wife before marriage with land, to which the custom did not extend. Lord Chancellor sent to the city to certify, Whether this jointure did not bar her of her customary right? It was certified,

That

Rep. of Cases
in Equity 94.

Michaelmas Term 6 Geo. I.

That it did not; because not made in bar of her customary part; but that had it been made in bar, it would have bound her.

Lord Chancellor *Parker*: It seems to me, That admitting the
* P. 458. custom of the city in general to be, that * the husband does not become a purchaser of his wife's third, when before marriage, she agrees to accept of a settlement out of *Land* in bar of her customary share, any more than he would in case the settlement had been of personal estate; yet notwithstanding, as this particular case is circumstanced, the husband must be considered as a purchaser; and consequently will have two thirds of his estate for his testamentary share.

Suppose without any precedent agreement, the wife had, after the death of the husband, released to the executors of her husband all her right to her third by the custom, Must not the executors of the husband have had the benefit of the release? No doubt they must. If so, What difference in reason is there, when the same thing is done in pursuance of a precedent agreement, and when without?

Where the husband is to be considered as dying without a wife; and where as a purchaser of her customary third.

The notion, That in this case the husband is to be considered as dying without a wife, does necessarily suppose the wife's third so totally destroyed, as to have no more subsistence either in law, or the consideration of the parties, than if the testator had never married: But here it is very plain, That the wife's right to her customary share does still subsist, both in law, and in the consideration and intention of the parties, as a collateral security to the wife for the husband's performing his part of the agreement; because, had he failed, she might have claimed her third.

As to the release executed by Mrs. *Barker*; when the meaning of the parties, the person applying to this court to make the release bind, and the will come to be considered, I think it clear, Mr. *Blunden* is not intitled to reap any advantage from it.

Mrs. *Barker*, in consideration of her marriage advancement, releases to her father all right, &c. that she shall have to any part of his estate, either by statute of distributions, custom of *London* or otherwise, *save what he shall be pleased to give her by his last will*.
* P. 459. Now what * is to be understood by this clause, *save, &c.* It cannot be *save* what he should give her out of his own testamentary share; for then it signifies just nothing, for the release did not extend to *that*, nor could the parties think it did. It must then have relation to some part of the estate, which it was thought by the parties, the release did cut her off from. And then the meaning must be this (and a very natural meaning it is) That in consideration of so handsome a settlement as I now make you, you shall promise me to be content with such part of your customary share, as I shall think fit to give you by my will; and consequently it was the meaning

Michaelmas Term 6 Geo. I.

meaning of the agreement, That the father should be considered as a purchaser of his daughter *Barker's* customary share.

And then the meaning of the agreement, which in a Court of Equity is chiefly to be considered, will be equally prejudicial to Mr. *Blunden's* right, as if it were left to its fate at law, where doubtless it would be void.

As to the person, that now applies to make this release good; it is to be considered, That it is not the father to whom this release was executed, that comes into this court, to have the benefit of it; but it is a daughter married against the consent of her father, that comes into this court, to support a release void at law, as an agreement in equity, in order in a great measure, to breathe in upon the will of her father, to whom the release was executed.

It seems to me a very harsh doctrine, and what, it may be, was never done, for a third person to come into a Court of Equity, to enforce an agreement void in law, in direct opposition to the meaning of the parties to the agreement.

The father had during his life an absolute power over this release, and might if he had pleased, have discharged his daughter from being bound by it.

* The question is, Whether he has not done *that* which was equivalent to it? It seems to me that a will, whereby he has given her all her customary share, is virtually and in equity, a plain declaration, That it was never his intention, she should be cut off from this share by virtue of her release.

If therefore, for these reasons, the release will not stand in her way, the next thing to be considered is, Whether the certainty of her advancement does appear under the hand of the father, in such a manner as the custom requires; for if it does not, then this advancement will cut her off from coming in.

And here the question is no more than this, Whether the certainty of her advancement does sufficiently appear in the marriage settlement; for the father being a party to it, whatever appears there, does appear under the hand of the father.

As for the uncertainty of the freehold estate, *that* nothing to the purpose; for the custom extends only to personal.

The personal estate in this settlement is 4000*l.* in money, expressly declared in part of her fortune; and the reversionary interest of a lease, without any value put upon it.

The first objection against this being a sufficient certainty, is the uncertainty of the value of this reversionary interest of the lease.

In answer to this, it is to be observed, That the custom of the city is not, that the certainty of the value of the advancement, or the certainty of the sum, but the certainty of the advancement must appear under the hand of the father.

VOL. X.

4 L

sufficiently certain, though the value of them be not expressed.

Where an agreement is void at law, equity will not carry it into execution in favour of a third person, and contrary to the meaning of the parties.

* P. 460.

If the certainty of a child's advancement does not appear under the father's hand, it is cut off from claiming a share by the custom.

Salk 427.

2 Vern. 630.

Advancement by land, no

bar to the

custom.

2 Vern. 754.

If it appear under the father's hand what things were given a child, the advancement is

Michaelmas Term 6 Geo. 1.

It seems to me that there cannot be a greater certainty, and less possibility of fraud or collusion than when the thing itself given to the child, appears under the hand of the father. If a father should say that * he had given a child such a diamond necklace, describing it, Is not this better than if he should put a value upon it; it may be more, it may be less, than the true worth?

* P. 461.

Besides, had this reversionary interest of this lease remained part of the testator's estate *Tempore Mortis*, it must have been valued, and may therefore as well now.

The 2d objection against the certainty is, That Mrs. *Barker* had both money and land left her by another ancestor; and that her father received in her right the interest of the one, and the profits of the other, and was at the time of the marriage, a debtor to his daughter upon this account; and that therefore it is impossible to know the certainty of that advancement, which is the remainder after this debt deducted.

Where it appears, a child has not been advanced above such a sum, but somewhat less; the uncertainty of the advancement may be cured by the child's bringing the whole sum into hotchpot.

The reason why the custom of the city requires the certainty of the advancement to appear under the hand of the father, is certainly in favour of the unadvanced children, that the whole of the advancement may be thrown into hotchpot. If therefore it does plainly appear, that a child has not been advanced more than such a sum, for instance 4000*l.* nay, that the child has not been advanced quite so much, but it is only uncertain how much short of that sum the advancement was, by reason of a trifling debt to be deducted, that cannot be reduced to a certainty; without doubt such an uncertainty may be cured, by the advanced child's quitting entirely this debt, and bringing in the whole 4000*l.* for the unadvanced children cannot be prejudiced, by bringing more than the advancement was. Not to admit this for an answer, were to reduce the custom of the city to this absurdity, That when a man has a right to so much and more, he shall lose *that* to which he has a certain right, because he cannot tell how much more he is intitled to.

* P. 462.

* If therefore Mrs. *Barker* quits her debt, this objection is at an end: But it is capable of another answer, if this were insufficient.

Mrs. *Barker*'s marriage portion consisted both of real and personal estate. If now the freehold estate, to which the custom does not extend, be esteemed to go in satisfaction of the debt; then the uncertainty of the debt will not create any uncertainty in the advancement, as far as the custom of the city is concerned in it. And this seems agreeable to the justice of the court in other cases; as where a man indebted by specialties and simple contract dies, leaving both a personal and real estate, this court will not suffer the debts by specialty to be flung upon the personal estate; and *that* being exhausted, leave the debts by simple contract unsatisfied, the land not being liable to pay them; but will decree the debts by specialty

Michaelmas Term 6 Geo. I.

to be satisfied out of the land, and the debts by simple contract out of the personal estate.

If in this case, the real estate had not been settled upon Mrs. *Barker* upon her marriage, but left her by will, Mr. *Blunden* would have thought it very hard, that this debt should have been discharged out of the personal estate, and so lessen his wife's share; when her sister had so considerable an estate in land left her, out of which this debt might have been deducted.

As to the demand of the widow, Mrs. *Ibbot*, That she should not be bound further than the penalty of her bond; there is very little in it. For I esteem the bond and articles of agreement before marriage, to make but one entire agreement; and the penalty of 3000 *l.* as circumstances then stood, was thought more than a sufficient penalty for the enforcement of it. And tho' this happens to prove otherwise, by an unexpected increase of the testator's estate; yet certainly a court of equity will hold her to her agreement.

* Upon the whole, it seems clear to me, that Mr. *Blunden* is, in right of his wife, intitled only to one half of a third of the personal estate of the testator. P. 463.

Easter

Easter Term

8 Geo. I. In Cur. Canc.

^{See 9 Mod.}
^{12.}
Gilb. Rep.
in equity 160.
^{1. Stra. 546.}
^{in 29. at}
^{the end.} Lady Coventry, widow of Gilbert Earl of Coventry, deceased. Contra the present Earl of Coventry, the youngest brother of Gilbert deceased; and Lady Anne Carew, the daughter and heir, and sole executrix of the said Gilbert.

* P. 464. **T**HIS was a bill brought in the court of Chancery to hold and enjoy 500 l. per annum of the real estate of Gilbert late Earl of Coventry, pursuant to the power reserved by the will of Thomas the father, and the marriage articles entered into by Gilbert precedent to the marriage with the plaintiff; or to have a satisfaction out of the personal estate of the said Earl; to have likewise a legacy of 3000 l. given her by the will of * her husband, and some other provisions made for her jointure by these articles; for as her portion was 10,000 l. so it was agreed in the marriage articles, that she should have 1000 l. per annum in land or money for her jointure.

Tenant for life with power to settle 500 l. per annum out of such and such lands on a wife, enters into marriage articles, by which he covenants for himself and his heirs, &c. That he, or his heirs would, in pursuance of this power, or otherwise, settle 500 l. per annum. The marriage takes effect and a settlement is drawn accordingly by his direction, of such lands as were comprized within the power; but never executed. Question, Whether this should bind the remainder-man, or whether the wife should have satisfaction made her out of the personal estate? Decreed upon a second hearing, that the lands should be settled.

Thomas Earl of Coventry, father of the said Gilbert, settled his estate by his will, bearing date March 24, 1698: Which settlement as far as concerns the present question, was to Gilbert his son for his life; then in tail-male to the first, second, &c. sons of Gilbert; remainder to his second son the present Earl of Coventry for his life, remainder in tail-male to his first, second, &c. sons, and so on. And further on

Easter Term 8 Geo. I.

in the will, this clause is added, *Provided nevertheless*, That notwithstanding any thing herein before contained, it shall be lawful for any person or persons, that shall become seised of lands or tenements under the limitations of this my will, by any writing under his or their hands and seal, to limit or appoint any lands, not being copyhold, nor leased out for lives, not exceeding in the whole 500 *l. per annum*; to any wife for her jointure, that shall bring with her a portion equivalent to such jointure.

Gilbert late Earl of *Coventry* enters into marriage articles, bearing date the 23^d of *June* 1715, by which, in consideration of a portion of 10,000 *l.* paid, he covenants for himself, his heirs, executors, &c. with Sir *Strensham Masters*, the father of the plaintiff, his heirs, &c. that he, or his heirs, should by deed indented, &c. at the request of the father, but at the charge of the Earl, his heirs, executors, &c. pursuant to this power reserved by the will of his father, or otherwise, settle upon the plaintiff for her jointure, or procure to be settled, lands of the full value of 500 *l. per annum*.

* He further covenants to settle upon her, for an addition to her jointure, an annuity of 250 *l. per annum* during her life; and that 5000 *l.* of her fortune should be laid out in land, wherein she was to have the term of her life for a jointure, or the interest of the money until the land should be bought from and after her husband's decease. P. 465.

The marriage took effect, the portion was paid, and about 2000 *l.* laid out in presents.

Gilbert the late Earl, immediately after his marriage, desired one *Charles Parsons* to consult with his steward, what lands were the properest to be settled in pursuance of these articles; and upon a diligent search into his estate and the settlements of the family, they could find no other manor, but that of *Woolvey* proper to be settled, and that was but 400 *l. per annum*.

This steward leaving his Lord's service and dying quickly after, occasioned further delay; the new steward being for some time unacquainted with the concerns of the family.

But the Earl often express'd great uneasiness at this delay.

And afterwards, upon looking for another manor to make up the 500 *l. per annum*, they pitched upon one that had an incumbrance upon it, that was necessary to be first cleared. But however at last, instructions were given and sent to *London*, to be laid before counsel, for preparing a draught pursuant to the articles. The draught was prepared, engrossed and sent down to the Earl, to be by him executed in the country. The Earl after the engrossment of the deed, being told what lands were to be settled by this deed, approved of their choice; but the actual execution of the settlement was prevented, once by an accidental visit of Mr. *Sandys*, afterwards by illness, and at last by the sudden death of the said Earl. When the Earl expressed his uneasiness upon the disappointments he had met with, in making this * settlement, he was told by counsel, he might be very * P. 466.

Easter Term 8 Geo. I

easy ; for that if he should die, a court of equity would esteem it as done.

At the time when the earl made his will, which was the day he died, there was a man and horse sent to the steward, who happened to be 50 miles off, and had the keys of the place where the engrossed deed lay ; but before the steward could come, the earl died. By the will he gave his wife, over and above what was agreed to be settled upon her by the marriage articles, a legacy of 3000 l.

The defendant Lady *Anne Carew*, daughter of the said Earl, (who died without issue male,) and executrix of his will, swore in her answer, that in case the 500 l. *per annum* was to be flung as a burthen upon the personal estate of her father, there would not be assets enough, to answer all the demands of the plaintiff.

Argument for the plaintiff.

It was argued by Sir *Robert Raymond*, Sir *Philip Yorke*, Serjeant *Chestyre*, and Mr. *Mead*, counsel for the plaintiff, and the defendant Lady *Anne Carew*, who joined with the plaintiff, in order to throw the burthen off the personal estate.

Of powers to charge estates. The construction of 'em.

That these sorts of powers receive always in a court of equity a large and favourable construction ; being powers given to those, who had it not been for such settlements, in which these powers are contained, would have been tenants of the fees themselves. This used as a reason by Lord Chief Justice *Holt*, for a large interpretation of these powers, in case of Sir *Charles Orby* and Lord *Mobun*, in Lord *Cowper's* time.

* P. 467.

It was observed, that these marriage articles want but one circumstance, *viz.* a certainty of the lands, to make 'em in point of law, a perfect execution of the power ; but that this defect, *viz.* want of certainty, was now remedied, at least in equity, by * the steps that had been taken in the most solemn and deliberate manner, towards the execution of this settlement.

What ought to be done in pursuance of covenants upon valuable considerations, equity looks upon as done.

It was said, that a court of equity will look upon a thing covenanted to be done, and intended to be done, as done ; and in case of a legal defect in the execution of it, aid and assist that defect : But indeed this must be understood of settlements, executions of powers, &c. founded upon valuable considerations, not voluntary ones.

Instances of defective executions of powers aided by equity.

The present case, the case of a jointure, which is always favoured, because it comes in lieu of dower.

2 Vern. 741. Rep. of cases in equity 130. A will cancelled upon false supposition, set up again in equity.

Onions and *Tyrer* was a case before Lord *Cowper*, where a former will appearing to have been cancelled, for no other reason, but because the testator thought he had made another to the same effect, which proved not to be duly executed ; it was determined, that equity would set up the former will again.

Easter Term 8 Geo. 1.

In the case of *Parker and Parker*, a man having power to charge lands for younger children, by a writing under his hand, attested by three witnesses, did in fear of sudden death, and being absent from home, by a paper attested by two witnesses, charge his estate with 7000 l. for his children; and this defect was supplied, because occasioned by his being absent from home, and so not being able to have a sight of the deed, where this power was contained.

Rep. of cases in equity 163.
Power to charge lands for younger children in writing attested by three witnesses; execution with two held good.

1 *Chancery Cases* 264, *Smith and Ashton*. The power was to charge lands, by deed or will in writing under hand and seal; the deed in which this power was, was a voluntary one; and in the execution of this power, the circumstance of a seal to the will was wanting; yet this defect was aided. For circumstances are but cautions to prevent imposition, the substantial part is to do the thing; and therefore when it is clear and indubitable, that the thing was designed to be done, the neglect of circumstances shall not avoid the act in equity.

Power to charge by will under hand and seal; seal wanting, and yet held good. For where the intention of doing a thing plainly appears, want of circumstance shall not avoid the act in equity.

of circumstance shall not avoid the act in equity.

* 2 *Chan. Rep.* 29, *Hele and Hele*. It was said, that if *de facto* the power had been executed, equity would have supplied the defects; for circumstances are only annexed to powers to prevent frauds.

* P. 468.
Circumstances annexed to powers only to prevent frauds.

In the case of *Peach and Winchelsea*, Lord Cowper seemed to be of opinion, that in case of a covenant to convey land, the money being paid, a judgment confessed to a creditor, between the time of the covenant and the conveyance, should not affect the purchaser; because in equity the land is esteemed to be sold from the time of the covenant.

Where articles are entered into for a purchase, and the money paid, tho' the vendor confesses a

judgment before conveyance, yet the purchaser shall hold the land.

Justice *Powell*, in his argument in case of *Bath and Mountagu*, admits, that even in case of a revocation, which is not so much favoured, a court of equity may interpose in a case of disability, as if the Duke of *Albemarle* had taken the deed over with him to *Jamaica*, and there having an intention to revoke it, had gone as far as he could, by making his will with six witnesses, that this should have been made good, tho' none of the witnesses were peers, because of the disability he was under to get peers.

In case of a revocation, want of formalities and circumstances (when omitted thro' necessity) shall be supplied by equity.

It was argued, that tho' possibly it might be objected, that the present case did not come directly within the authority of the cases quoted, because here the plaintiff did not come into equity to establish a conveyance already executed, and only attended with some trivial legal defect, but to set up a conveyance that had not been at all executed; yet it did within the reason of these cases, for all the preparations, that were from time to time taken in order to the execution of it, manifest as fixed and resolved an intent to have executed it, as if it had actually been done.

Rep. of cases in equity 138.
2 Mod. cases in law and equity 14.

Easter Term 8 Geo. I.

And to speak properly, a deed or power executed but defectively in some legal circumstance, is really not executed in point of law at all; so that in that case, a court of equity may be said to set up a conveyance not executed, because in point of law the whole execution is null and void.

* P. 469.

Stat. 32 H.
8.

* Had this draught engrossed been a will, it had been a good will within the statute of *Hen. 8.* and before the statute of *Frauds*; for that statute does not require the will to be of the hand-writing of the testator, but only to be reduced to writing by his direction.

Covenant to
sell and con-
vey, equity
will compel
the heir to join in the sale.

A covenant to sell and convey, so far considered in equity, as that the court will compel the heir to join in the sale, tho' this be to his disinherison; for the money will go to the executors.

But where
tenant in tail
articles to sell,
and dies be-
fore convey-
ance, the issue
is not bound.
Stat. de donis.
Yet if tenant
in tail, with
power to
make leases
for three
lives, cove-
nants to make
such a lease,
it shall bind
the heir.

It is true, that *where* a tenant in tail contracts for the sale of land, and dies before execution, the court will not carry this into execution against the issue. But the reason of this is, because it is contrary to the intention of the first donor, who designed as the statute *de Donis* says, that the estate should remain in the blood, &c.

But yet if a tenant in tail having a power to make leases for three lives, should covenant to make such a lease, and die before execution; the court would carry this into execution against the heir, tho' they would not a sale.

Defects in vo-
luntary con-
veyances not
much fa-
voured.

Barkham and *Barkham* was a case, in the Lord *Somers's* time, wherein he decreed a defective jointure to be made good, against those that claimed under a marriage settlement, and within the consideration of the marriage settlement.

There may possibly be cases, where a court of equity has refused to do this, *viz.* to support, or make good conveyances, defective in some legal circumstance; but then this has been when it was demanded in favour of voluntary provisions.

This 500*l.* *per annum* jointure, but a small incumbrance, in comparison of what the estate of the present Earl is able to bear; and he is one that will be the less favoured in this court, upon account of his being a volunteer.

* P. 470.

Accident one
great branch
of the jurif-
diction of the
court of
chancery.
See page 1.

* It was further urged, that as *accident* is one great branch of the jurisdiction of this court, no case could ever come before it, attended with more and stranger incidents of this nature, to be intitled to relief, than the present.

The great difficulty of finding out lands free from those incumbrances mentioned in the original power, death of the steward, fear to come up to *London* on account of the small-pox, the accidental visit of Mr. *Sandys*, the illness of the Earl, his Lady's tendernefs for his health not suffering him to be discomposed by business, and the suddennefs of his death when the physicians thought him out of danger,

Easter Term 8 Geo. I.

danger, are all so many accidents concurring to prevent the execution of this deed, and which cry for relief in this court.

It was likewise said, that the opinion of counsel in this case, would be considered as a favourable circumstance, who all informed the Earl, he need not be uneasy; for if he died, a court of equity would consider this deed as executed.

Mr. *Cowper*, counsel for the present Earl. The question *here* is For the defendant. not whether a court of equity will supply some slight defects in the execution of a power; but whether this court will entirely supply a non-execution; and *that* in favour of a person not without remedy. For she has a covenant that binds the heir at law, and the personal estate that the heir as executrix is entitled to; which (we say) will, upon inquiry, be found to amount to 2000*l.* over and above the 5000*l.* covenanted to be laid out in land, (wherein the plaintiff is only to have her life) and the 250*l.* *per annum* annuity.

So that it cannot be pretended, that in this case, here is any want of provision; there is one almost adequate to the fortune, tho' she should not succeed in what she now prays against the present Earl. * P. 471.

* Lord chief justice *Holt*, in his argument in the case of *Both* and *Mountagu*, strongly insists upon it, as a fixed and settled point in law, that powers are to be strictly pursued; because created by the owner of the land, in which case *stat pro ratione voluntas*. A settled point in law, that powers ought to be strictly pursued.

When a court of equity decrees conveyances to be made, and powers to be executed, it is always in cases attended with circumstances of such weight, as to make it appear fit and proper to be done in the judgment of mankind; and without such circumstances, a court of equity will never do it; it being *pro tanto* a departure and variation from the common law. Maxim. Equity ought to decree conveyances, or supply the defective execution of powers only in particular and extraordinary cases.

cases; viz. in favour of creditors and purchasers; or to make provision for younger children.

As to a surrender in case of copyholds; there is no doubt, but this court may supply a defective surrender, or decree one where there is none at all; but tho' the court may do this, surely it is not bound to do this, and in all cases, and only because it is asked. No; it is to be done upon particular circumstances (as equity cases turn upon circumstances) and in favour of purchasers, or persons that in law or equity are considered as purchasers; as a wife and children unprovided for. Therefore Lord *Somers* in the case of *Kettle* and *Townsend*, decreed a conveyance of a copyhold in favour of a grandchild unprovided for; but the house of Lords reversed the decree, as thinking the court had gone too far in extending this power to grandchildren. And this court has refused to supply a defective surrender in case of a wife provided for before. Salk. 187. A decree to supply a surrender of a copyhold in favour of a grandchild, reversed in the house of Lords.

Easter Term 8 Geo. 1.

Denied to be
supplied in
case of a wife
provided for
before.

Biscoe v. Cartwright 1716. Rep. of cases in equity 121.

If the cases quoted for the plaintiff be re-considered, some circumstances will be found attending upon them, as will turn them into so many authorities in favour of this Earl now defendant.

Ant. 467.

2 Vern. 164.

As to the case of *Smith and Ashton*; Lord Chief Justice *Holt* takes notice of it, in his argument in the case of *Bath and Mountagu*; and according to him, the indulgence a court of equity ever shews to provisions made for younger children, was the chief ingredient in the case.

* P. 472.

* Besides, one very material circumstance, as it is reported in *1 Chanc. Cases* 265, was omitted, when quoted by the counsel for the plaintiff, which was, that an issue was directed to be tried at law, Whether such notes in writing were part of the last will of *Ralph Ashton*; and being found by the verdict to be his will, and in favour of younger children thus provided for, the court decreed the power well executed, tho' the circumstance of sealing was wanting.

But is this an authority, that the court should in the present case, in favour of one so amply provided for otherwise, decree the execution of a power *ab origine*, where it was not executed at all?

Ant. 468.

As for the case of *Hele and Hele*, it is indeed the case of a jointure, but as there is no decree in it, the authority of it cannot be great; and the counsel in quoting it, seemed to make use of it under the head of accident. But certainly, the pretence the plaintiff sets up to be relieved in this court, under the head of that branch of the jurisdiction of it (*accident*) is the most groundless in the world.

Ant. 470.

The articles were made in the year 1715, the Earl died in 1719, four years and a half intervenes, and yet, according to them, it must be esteemed an *accident*, that he died before he could make the settlement, in pursuance of the articles; and to support this part of the case, the evidence gives us a history of his *steward*, his *gout*, the *doctor*, and the *bath*.

If it must be looked upon as an accident that a man dies in four years, why not in eight? Nay in eighty? I know not where to put the bounds.

Were it proper or convenient to enter into the particular circumstances of this noble family, it would appear, that the present earl is not so amply provided for, considering all the incumbrances upon his estate; and therefore it would be still harder for this court to interpose to his prejudice, and in favour of one otherwise so well provided for, as this lady is.

* P. 473.

2 Vern. 531.

542.

Power to

make leases,

reserving the

ancient rent;

* In the case of *Sir Charles Orby and Lord Mobun* 4 Ann. where Lord *Cowper* was assisted by chief justice *Holt* and other judges, a bill was brought to have a defective execution of a power of making leases supplied. In the power it was expressly enjoined, that the ancient rent; ancient rent reserved in the lease, but not said what that was.

cient

Easter Term 8 Geo. 1.

ancient rent should be reserved; in the execution of the power the ancient rent was reserved, but not said what the ancient rent was. This, tho' such a defect, as this court by sending it to a master might have supplied; yet this court would not interpose, because to the prejudice of a third person, the remainder man.

Lease held not good; because to the prejudice of a third person, the remainder man.

This most certainly a precedent, That what is now desired of the court is a discretionary power, to be exercised by this court, as the circumstances in every particular case shall direct.

Rep. of cases in equity 137. See Com. 250.

The case of *Piggot and Penrice*, in Lord Cowper's time, A. D. 1717, was this, A wife having a power in a settlement she had made in favour of her husband, to revoke the uses and limit new ones, writes to one to prepare a deed to revoke the uses, and settle the same upon such a relation; in which letter she takes notice of this power in the settlement, that did enable her so to do; falling ill she sends another letter, pressing the preparing of this deed; for that it was her absolute will to revoke the uses, and give her estate to this relation.

A woman makes a settlement in favour of her husband, with power of revocation, and afterwards sends letters of instructions to have a deed prepared in pursuance of this power, for revoking that settlement, and to give the estate

In this case the court declared, that they would not interpose; that they must judge by what she had done, not by what she intended to do.

Had she been hindered from the exercise of this power, by the act of her husband; then the court said, they would have interposed: So possibly in this case; had the execution of this power, been prevented by the art and contrivance of the present earl, it had been a reasonable ground for this court to interpose.

to such a relation; and yet dying before the deed was executed, notwithstanding her intention plainly appeared in the letters, it was held to be no revocation. But if she had been hindered from revoking this settlement by any act of her husband's, the court would then (as they said) have been of the contrary opinion.

* *Mr. Talbot*. It must be admitted, that the limitation, by which the present earl enjoys, is a voluntary conveyance: But then it must be considered, that he claims under the will of the father of the late Earl; and so by a title paramount to that of the late Earl, who was himself a volunteer; and then I do not see, how one volunteer deserves more favour than another.

* P. 474. Ant. 496.

It is said, that the present Earl claims under a limitation clogged with this power, which is true. And had Earl *Gilbert* been pleased to execute that power, which he was perfectly at liberty to do or not, the present Earl must have submitted to it; but since the power is unexecuted, it is just the same, as if there had been no power at all ever created.

The executing, or not executing of this power was a meer contingency; and as the Earl must have been bound, if the less favourable contingency had happened, very reasonable that since the more favourable contingency has happened, he should enjoy the benefit of it.

The estate of the present Earl is already clogged with two considerable jointures now subsisting, and other incumbrances; so that were the intention of the creator of this power of any weight, it is very

Easter Term 8 Geo. I.

very probable, he would not choose to have the estate of the family incumbered at once with so many jointures, which does not so well answer the end proposed by him in creating the intail, viz. the supporting the honour and dignity of the family.

Ant. 466. It has been said, that these articles are even in point of law, an execution of the power. If this were so, the plaintiff must take her remedy at law, not in equity.

But there is not the least colour for this. For it plainly appears from the wording of the articles, that however it might be primarily and originally, the intention of the parties to have made this settlement, in * pursuance of the power in the will, yet that they never intended to confine and restrain themselves to it.

* P. 475.

The covenant is, that Earl Gilbert, or his heirs, at the request of the lady's father, &c. shall by deed indented, &c. according to the power reserved by the will of the said Earl's father, or otherwise, settle or procure to be settled, lands of the value of 500 l. per annum, for her jointure.

The words or otherwise set the articles loose and at large as to the power: for very evident that the settling of any lands, tho' not within the power, would have been a good performance of the articles.

The covenant is, that Earl Gilbert or his heirs shall do it; so that if the heir did it, it would be a good performance of the articles: But it is impossible that a power given to any person claiming under that settlement, to jointure his wife, can be an authority for a son (the heir) to jointure his mother.

It is said the plaintiff is a purchaser; it is true, she is so, but of what? Not of any lands comprized in the will of Earl Thomas, and to which this power extends. All that she is a purchaser of, is a right to a jointure; and as a security for the performance of it, she has relied upon the personal covenant, which binds Earl Gilbert and his heirs; and if there are assets sufficient for that purpose, these are proper to be applied in satisfaction of this covenant. And to make the largest and most favourable construction for her; she can only be esteemed a purchaser with respect to us, pro tanto as the assets fall short of this 500 l. per annum.

It has been said, that whatever a man does not give away from himself, remains in him; and that whatever powers are reserved by the donor, (being part of the old dominion he had over his own estate) ought to receive a large and benign interpretation.

This rule tho' true, not applicable to the present case; for the person against whom this power is desired to be executed, is one that receives his estate from * the same bounty, that he who should have exercised it did; and consequently since both claim under the same title, and from the same donor, the one cannot challenge more favour than the other.

* P. 476.

Rules of law, the boundaries and fences of property. It is a matter of the highest importance, that rules of law, the boundaries, and fences of property, should remain fixed and settled, and

Easter Term 8 Geo. I.

and be never broken in upon but with very good reason, and that too as seldom as possible; and consequently, a Court of Equity will not be forward to do it in favour of volunteers.

Therefore in the case of *Arundel and Philpot*, mentioned in the ^{2 Vern. 69.} case of *Bath and Mountagu*, where there was a settlement with a power of revocation, upon the tender of a guinea; the plaintiff claiming under a latter settlement, made in pursuance of this power of revocation, could not prevail to set aside the first settlement, even in a Court of Equity, for want of being able to prove that little circumstance of the tender of a guinea; but being a volunteer, was sent to law to have it tried, revoked or not revoked. Indeed at law the party was so fortunate as to prove the tender.

lands to different uses; but the tender of the guinea not being proved, the court refused to set aside the first settlement.

Tenant in tail covenanted to sell, received the money, stood in contempt to this court, for not suffering a common recovery, and died in contempt, without doing of it; yet this court would not compel the issue to do it.

Cases of Lanyon and Williams, Weale and Lower, Powell. 2 Vern. 306.

It is said indeed, That the reason of this is, because it is in derogation of the intent of the donor. But this though specious, and what might have held at the time of making the statute *de Donis*, cannot be said with any reason at this day; for whoever gives an estate-tail, must be presumed to intend to give it with all the legal advantages. And as every body is presumed to know the law, the donor must be presumed to know, that by proper ways and methods, the tenant in tail may dispose of his estate, and be willing he should.

* As to the power exercised by this court in marshalling of assets; this court never does it in favour of a residuary legatee; and where it is done, it is done for the sake of paying debts, and in such a manner, as the creditors might have done themselves; and therefore where the heir at law can have no reason to complain.

* P. 477.

It was replied for the plaintiff, That notwithstanding what has been said to the contrary, this is a favourable case; being that of a Lady who brought a great portion into the family, and will otherwise be stripped of a great part of that jointure, she covenanted and paid a valuable consideration for.

As to the objection raised from those words in the covenant, or otherwise,

It is capable of two answers,

1st, That it is a common caution, or phrase made use of by conveyancers to prevent any danger, that may arise from mistakes, or misrecitals; Or,

VOL. X.

4 O

2dly,

Easter Term 8 Geo. I.

2dly, It may relate to the manner or form of the conveyance; for very improbable that it should relate to lands not comprehended in the power, the Earl at that time having no other.

Ant. 467,
471.

In the case of *Smith and Ashton*, in 1 *Chan. Cases*, the doctrine is fully laid down, That circumstances annexed to the execution of powers, are but in the nature of cautions to prevent surprise; and therefore when the intent is plain, a Court of Equity will dispense with them. And as that case is quoted by Mr. Justice *Powell*, in the case of *Bath and Mountagu*, it is entirely put upon the accident of death preventing the execution of the power.

Ant. 468,
472.

Case of *Hele and Hele*, 2 *Chan. Rep.* 29. was a case of a non-execution of a power; and though there was no decree, yet the Lord Chancellor by directing the plaintiff to amend a fault discovered in the bill, plainly declared what his sense was.

* P. 478.

The distinction has always been taken between settlements perfectly voluntary, and those founded upon a valuable consideration. Mr. *Cowper* has indeed advanced another of provision, and no provision; but cited no case in maintenance of this distinction.

In the case of *Smith and Ashton* there was a collateral provision; and so it is an authority against that distinction.

Provision or
no provision,
material in
voluntary
conveyan-
ces; but not
in those
founded on
valuable con-
siderations.
Ant. 475.

Indeed in cases of voluntary conveyances, the court has thought the matter of provision or no provision fit to be regarded; but never in conveyances founded upon a valuable consideration.

As to the objection, That had this power been reserved to the party himself, it would have received a large interpretation; but being to a remainder-man it must have a strict one:

It may be answered, That this is a power reserved to a son, who without this settlement, being heir at law, would have had the whole fee in him; and therefore is entitled to the same favour; which is a reason allowed of in case of Sir *Charles Orby* and Lord *Mobun*. Indeed as to the case itself, it was said to be fit to be left to the law; because a voluntary and peevish execution of the power.

Ant. 473,
476.

The cases of *Pigot and Penrice*, and *Arundel and Philpot*, were cases relating to powers of revocation, not so much favoured by this court, and voluntary; so that though the court denied relief, they did it upon grounds that we admit of.

Ant. 476.

As to the case of tenant in tail; it is contrary to the intention of the donor, at least the primary one; though the law gives the tenant a power to defeat this intention, in a proper manner.

Stat. de Donis.

It is contrary to the statute *de Donis*, made in support of this intent of the donor; and though this statute has been so expounded, as that by feigned actions, &c. yet if that particular way chalked out by the law be not complied with, a Court of Equity may refuse to interpose.

Easter Term 8 Geo. 1.

* In the case of Lady Clifford and Earl of Burlington, Lord Clifford had a power to limit a jointure of 1000 *l. per Annum* on lands in Ireland. Upon his marriage he covenanted accordingly to settle a jointure of 1000 *l. per Annum*, sends to his steward in Ireland for particulars, which were sent, and the conveyance made; but after his death it was found that the lands did not amount to more than 600 *l. per Annum*. A bill was brought against the remainder-man to have the jointure completed; and decreed by Sir Nicholas Wright against the remainder-man.

* P. 479.
2 Vern. 379.
Rep. of Cases
in Equity 167.
One having a
power to li-
mit a jointure
of 1000 *l. per*
Ann. cove-
nants upon
marriage to
settle 1000 *l.*
per Ann. The
proved only 600 *l.*

conveyance is made according to a particular, that was supposed to be of that value, but proved only 600 *l. per Ann.* Decreed the jointure should be made up by the remainder man.

That clause in the will of Earl Gilbert, wherein he gives her 3000 *l.* over and above what was settled upon her by the articles, a plain proof, that he did look upon the articles as a good execution the power by way of appointment. Ant. 466.

As to what was said, That this case cannot fall under the head of accident, because the Earl lived so long after the marriage: Ant. 472.

It is easy to answer, That four years or more may be as much apologised for and covered by accidents as one; and whether the present case be not such a one, must be submitted to the court upon the evidence.

Lord Chancellor Parker: As to the 500 *l. per Annum*, the Lady Coventry has certainly a very strong, and a very favourable case; there can be no question whether, though there may from whence, she ought to have it.

It does not appear to me, but that the heir at law may literally perform this covenant; and then the controversy will be only between the present Earl and the heir at law.

I do not believe, the defendant in her answer, looks upon the 5000 *l.* deposited for a purchase, as assets. Whereas the plaintiff being intitled to interest only for her life, the reversion is assets.

* Suppose the plaintiff had brought her action at law, upon her covenant, against the heir at law; it deserves to be considered, whether the heir at law could have come into this court, to have been relieved against the remainder-man, and to have had this land settled in case of his personal estate, and discharge of the covenant laid on him by the ancestor. * P. 480.

Absurd to imagine, That the words or otherwise should relate to the manner of the conveyance; or that the settling of other lands, to the value of 500 *l. per Annum*, than those comprehended in the power, would not have been a full performance of the covenant. And impossible that the heir making a settlement upon his mother, could be supposed acting in pursuance of a power, enabling a man to settle land upon his wife, for her jointure.

This

Easter Term 8 Geo. I.

This is a case of great importance. Marriage settlements and executions of powers are of daily use; and therefore I shall be very cautious of making precedents.

I will not determine it without the assistance of some of the judges; in the mean time I will direct an inquiry into the assets, that so I may know how far Lady *Coventry* is concerned in the question.

The present Earl being only tenant for life, no decree that I can make will bind the issue; and therefore more safe for the Lady to have a satisfaction out of the assets upon the covenant, if there be enough to answer all her demands.

N. B. When the cause came on again, the Judges that Lord Chancellor called to his assistance, were of opinion, That the marriage articles entered into by Earl *Gilbert*, together with the deed of settlement, drawn by his direction in pursuance of the said articles, was such an execution of the power reserved in the will of Earl *Thomas* his father, as was binding in equity. And accordingly it was decreed, That the plaintiff should have * for her jointure, the lands mentioned in the said intended settlement.

* P. 481.

Hill versus Filking & ux. In Canc.

98 Mod. 154.
Cases in Ch.
22. 2. 11. 11. 11. 11.
Cases upon
Stat. of 11 &
12 W. 3.
Roman Ca-
tholicks.

A Grandmother having no children, but only a grandson and granddaughter, and being a Roman Catholick, she made her will *May* 8. 1716. by which will she devised her estate to three trustees, whereof two were Roman Catholicks, the third a Protestant; the estate she devised to be sold for the payment of her debts; she gave 100 *l.* legacy to her grandson, that was her heir at law; the surplus she directed should be paid to her granddaughter, at her age of 21. or marriage; provided that she married with the consent of the two Popish trustees, the Protestant trustee being to be unconcerned in that affair. Having made this will, she died in *July* 1716.

In *August* 1717. the granddaughter married a Protestant, by the consent of the Popish trustees. At the time of the death of the grandmother, the grandson was but nine years of age, and educated in the Roman Catholick religion. The granddaughter at the time of her marriage was fifteen, and likewise educated a Papist, and professed that religion, at the time of making the will, and of the death of the grandmother, and at the time of the marriage. Both grandson and granddaughter have since conformed, taken the oaths, &c. before they came to the age of eighteen.

It was the persuasion of witnesses examined in the cause, That the true motive that prevailed with the grandmother to disinherit her grandson, her heir at law, and give her estate to the granddaughter,

Easter Term 8 Geo. I.

ter, was, that the grandson being but nine years of age, she did not know but he might easily be brought up a Protestant; but the * granddaughter being fourteen years of age, and so better grounded in * P. 482. her principles, she hoped would firmly adhere to the Roman Catholic religion.

Though the Popish trustees consented to the match, and *that* with a Protestant; yet nothing was settled upon the wife, but barely her own fortune; and *that* too subject to a power of revocation by the husband and the Popish trustees.

Question now before the court was, Whether this devise to the granddaughter, was not void by the 11 & 12 W. 3. and so the grandson intitled to have the trust of the residue, decreed to descend on him, as heir at law, and having taken the oaths, &c. as that act requires, within six months after the age of eighteen?

This point depends upon two clauses in that act.

The first clause enacts, That from and after the 29th of September 1700. if any person educated in the Popish religion, or professing the same, shall not within six months after attaining the age of eighteen take the oaths, &c. such person shall in respect of himself only, but not in respect of his heirs or posterity, be disabled and made incapable to inherit or take by descent, devise or limitation, in possession, reversion or remainder, any lands, tenements or hereditaments; and that during the life of such person, or until he or she shall take the said oaths, &c. the next of his or her kindred, which shall be a Protestant, shall have and enjoy the said lands, &c. without being accountable for the profits.

The second clause enacts, That from and after the 10th of April 1700. every Papist, or person making profession of the Popish religion, shall be disabled and made incapable, to purchase either in his or her own name, or in the name of any other person or persons, to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms or hereditaments, &c.

* It was argued for the grandson, the heir at law, That it cannot be disputed since the case of *Reper* and *Radcliff*, that though the estate is devised to be sold for the payment of debts; yet as to the *Residuum*, it must be considered as a devise of land. * P. 483. For the plaintiff, Ant. 93, 234. &c.

It must likewise be admitted since that case, That the word *Purchase* in the second clause does include devises, and all manner of ways of coming to estates in opposition to descent; and consequently, that if the granddaughter be a person that falls under the second clause, this devise to her would be void. Ant. 95, 234, 242.

As to the description of the persons, to which the word *Purchase* in the second clause does relate; it is only a Papist, and one professing the Popish religion. And certainly the granddaughter, who

Easter Term 8 Geo. 1.

is proved to have been educated in, and to have professed the Popish religion at the time when the will was made, when the testatrix died, (the time when the right to the *Residuum* vested, though it was to take effect *in futuro*, viz. 21 or marriage) nay at the time of the marriage, and so zealous in her religion as to declare she would be torn to pieces by wild horses before she would turn Heretic, must be esteemed one that comes within the description in the act, *a Papist, or person making profession of the Popish religion*. And though she has since conformed, yet since she did not do so at the time when the testatrix died, the time when her interest vested, the subsequent conformity will not replace that interest which is now vested in another. All this is so plain that it could not in the least be controverted, were the question singly to be determined upon this clause.

But it may be objected, There is another clause in this act, and care must be taken, that such an interpretation be put upon both these clauses, as to make them consist with one another. And this the counsel for the grandson owned there must; but insisted that
* P. 484. * putting of this construction upon the second clause, would not contradict any thing enacted by the first.

For whoever considers the act well, will find, That the law-makers intended by the first clause to have regard to the estates that then were in being. And as to these it is plain, That the act never intended to break in upon, or interrupt the course of the descent; but only to create a temporary incapacity or disability of taking the profits, removeable by conformity before such an age.

And though the word *Devise* be in that clause; yet it must be understood of such devises, as are designed to prevent the descent; and consequently must relate to such devisees, who being heirs at law would have taken by descent, had it not been devised to them. And had they not done this, they had done nothing; for the act might have been evaded with all the ease imaginable.

As by the former clause the statute provides for estates then subsisting; by the second it intended to provide against all new acquisitions by persons professing the Roman Catholick religion. And here the legislators thought it reasonable to provide against this, not by creating, as in the former, a temporary incapacity removeable by conformity; but a total and absolute incapacity to take at all.

As the granddaughter appears thus plainly to have been within the description of the last clause; so it is no less plain, That the grandson, being heir at law, has by his conformity, within the time prescribed by the act in the first clause of it, put himself in a capacity of taking by descent, as heir at law.

For the descendant.

In favour of the granddaughter it was argued, That the great design of this act of parliament, was to encourage Roman Catholicks to turn Protestants, by making it their interest so to do: Whereas
1 this

Easter Term 8 Geo. I.

this interpretation would be a great discouragement ; since by turning they were to receive no advantage. And therefore it was * P. 485. insisted, That since this last clause was in that respect more severe, and created a total incapacity, without restoring them upon their conformity, it should not be extended to any that could possibly come within the former ; and that therefore as the first clause respected persons under the age of eighteen, so none should be deemed persons professing the Popish religion within the second clause, but such as were above that age at the time of the purchase. And that the first clause may extend to the granddaughter is plain, the words being to take by descent, limitation or *Devise*.

Lord Chancellor *Parker* :

The grandson seems to me to have a strong case. It is admitted that the granddaughter is within the express words of the second clause ; she being proved to be a person professing the Popish religion at the time of the making the will, and of the death of her grandmother, and of her marriage.

But it is said, That this second clause must, as to the persons to whom it is to relate, be restrained by the first, so as not to extend to any comprehended in that clause ; for otherwise, as the disabilities created by these two clauses are different in their nature, the one part of act would contradict the other.

The meaning of the first clause in this act has been very much mistaken. It has been imagined that this clause has relation to the age of the person at the time of the descent ; whereas the act says nothing at all to that matter. For it is plain from the act, that the age of the person has relation intirely to the time of taking the oaths, &c. not of the descent : And therefore though when the infant comes to the age of eighteen, the descent has not happened ; yet then it is that the time prescribed by the act for qualifying, &c. commences, in order to become capable of what may hereafter descend to him. In case he slips this time, and * the land descends * P. 486. afterwards, the incapacity by the act takes place ; nor is this any hardship, since he had it in his power by a timely conformity to have been capable of taking it.

The first clause in this act of parliament has respect to old subsisting estates. But whereas the law-makers plainly foresaw, That if they should only use the word *descend*, the act would signify just nothing ; therefore the words *Limitation and Devise* were added : The first to comprehend all those estates, where the present possessor being only tenant for life, the son in remainder was to take by *Limitation* ; the other of *Devise* to prevent the interrupting the descent, and so evading the act, by devising to the heir at law.

The second clause has relation to estates, to be created *in futuro*. And as to these estates, the legislators thought it reasonable to create
not

Easter Term 8 Geo. I.

not a temporal incapacity, removeable upon conformity by a certain age ; but a total and absolute disability to take at all.

From this view of the act of parliament it appears, that the words, in the first clause, *Devise* and *Limitation*, have a proper use and signification, without breaking in upon the second clause ; for they extend to all such devises and limitations, as are not made void by the second clause, of which many instances could be given.

And thus it appears that the second clause, being intirely distinct from the first, the age of eighteen is intirely immaterial.

Even in the opinion of the counsel for the granddaughter, the legislators did not think proper to lay persons over the age of eighteen, and professing the Popish religion, under the temptation of turning Protestants by giving them their estates upon conformity ; and therefore the argument drawn by the counsel for the granddaughter, from the intention of the legislators, to encourage Papists to turn Protestants by giving them their estates again, is of no force ; for in the
* P. 487. first * clause it was their intention, but in the second most evidently it was not.

The only remaining question will be, to fix the time when a person may be said to profess the Popish religion ; and this indeed will be extremely difficult and perhaps impossible, upon account of the difference of capacity, education, &c.

I can be sure that at one, two or three years of age, a person cannot be said to profess any religion at all, and consequently not the Roman ; so at eighteen and before, I can be sure that persons may profess the religion they are of, and consequently the Roman.

This the makers of the act plainly supposed, when they enacted, That if any person *professing*, &c. shall not within six months after attaining the age of eighteen, &c.

But for the exact bounds, impossible to fix them ; and they must therefore be left to the discretion of the Judges, who will be very indulgent in this matter.

The case is a new one ; and therefore I will have the assistance of the Judges.

But his lordship directed some issues at law, to bring the case more fully before the court.

Vide infra, Trin. 11 Geo. I.

Easter Term 8 Geo. I.

Mills *versus* Eden. In Canc.

EDEN being indebted to *Mills* in the sum of 500 *l.* for his better security confessed a judgment to him.

In July 1712. *Eden* makes his will, and devises his land to trustees to be sold for the payment of debts, and dies. The trustees being dead or refusing to act, administration with the will annexed is granted to * the plaintiff *Mills*, as being the largest creditor, and *that* by judgment. Care of Court of Equity to see debts of the testator paid. * P. 488.

Mills brings this bill against the widow, and others of his creditors, to have an account of the estate, discover incumbrances, &c.

What was special in the case was this, *Eden* made a settlement upon his wife after marriage, of the lands that were then his father's, in bar of dower and thirds; his father joining with him. The uses in the settlement were to the use of his father for his life, then of the mother for her life, remainder to the use of *Eden* for his life, remainder to *Mary Eden* his then wife (the defendant) for her life, for her jointure in bar of her dower; thirds, &c. remainder, &c.

The father was alive at the time when the defendant *Eden* put in her answer; but died before the hearing of the cause. She by her answer waives this settlement, as being made after marriage, and not to take effect in the original creation of it, immediately upon the death of her husband, as the statute about jointures requires; for the father might outlive the husband, and in fact did so, and so might the mother; and though they are since dead, yet *that* will not make the jointure more binding: She therefore insisted upon having her dower. Jointures.

But the Lord Chancellor seeing in the case, That if she waived this settlement, these lands would go to the heir at law, not subject to the payment of any debts, since it was never part of the testator's estate, the father outliving him; and that if she was to have her dower, there would not be assets to pay (as the counsel said) 5 *s.* in the pound; and so that the wife did this, in favour of the heir at law, to the prejudice of the creditors.

* He decreed, That she should take this estate for her life, under this settlement; but that she should assign it over in trust for the creditors, who should convey to her a third of the land of her husband, for her dower, free from incumbrances. * P. 489.

He said, That this was no more than what was agreeable with what the court does in other cases; as in decreeing a judgment

Easter Term 8 Geo. I.

creditor, who has his election at law to resort for his satisfaction to either real or personal estate, to make such an election, as simple contract creditors may not be defrauded.

Cock and Goodfellow. In Canc.

The case.

WALTER COCK devises by his will one third of his personal estate to his wife, the other two thirds to be equally divided among his children, with the advantage of survivorship, in case any of them died before they came of age. He made several, and among the rest, his wife, guardians of his children. He directed, That the estate of the children should be placed out to interest, or other way of improvement, by the consent of the majority of the guardians; and he further directed, That his wife should have the advantage of the improvement of two thirds of the estate of the children, without any account, for their maintenance; and that the interest of the other third should go towards the increase of their fortunes. He makes his wife executrix, and dies in *August 1712.* leaving behind him a very considerable estate, both in money and the stocks.

His wife proves the will, and takes possession of the estate.

In May 1714. *Peter Vandermaash* one of the wife's brothers died, and left in money to the children about * 2500 *l.* which money

* P. 490.

came into the hands of their mother. It was proved by the book-keeper, That immediately upon the death of the father, an account of the whole estate was taken, and an exact estimation made of what each child's share came to; and that the accounts of every child, with the interest and income belonging to his fortune, were with great exactness kept separate and distinct until the year 1719. when upon casting up the accounts, the whole estate belonging to the children was found to amount to about 24000 *l.*

In May 1720. *Mrs. Cock* the mother, treated of a match for her eldest son, with a daughter of *Lord Trevor*; and by marriage articles it was agreed, that 5000 *l.* should be paid by the mother *Mrs. Cock*, and 5000 *l.* by *Lord Trevor*, into the hands of trustees, to be laid out in land, and settled in the usual way of marriage settlements. *Mrs. Cock* covenanted besides, That she would purchase 100 *l.* per Annum, and settle it to the same uses as the former except the jointure.

About this time, *Mrs. Cock* lays out about 10700 *l.* in a purchase of land of one *Scot.*

Mrs. Cock all this time carried on a very great trade. In *October 1720.* her brother *Vandermaash* in *Holland* sent her word, that though he had in effects more than enough to answer all demands; yet so great

Easter Term 8 Geo. 1.

great was the run upon him, occasioned by the sudden fall of credit in *Holland*, that unless she would supply him immediately with money and credit to the amount of 40,000 *l.* he could not stand it.

Mrs. *Cock* complied with his desire; but at the same time, viz. the 19th of *October* 1720. she makes a deed, wherein taking notice of the will of her husband, and what was left thereby to her children, and of the will of the uncle and what he left them, and of the sum that appeared due to the children upon an account taken in the year 1719. and of the marriage articles of her son, by which 5000 *l.* was to have been paid to * trustees for, &c. and 100 *l.* per * P. 491. *Annum* purchased, &c. she covenants that for the better securing what thus appeared to be due to her children, she would immediately transfer to trustees, &c. all that she had in the several funds; and whereas the books of the *South-Sea* company were then shut, she declares, that as to the *South-Sea* stock, she was but a nominal trustee for her children, the stock having been bought with their money; and that as soon as the books were open, she would transfer, &c. And in the same deed, the estate that she had for her life, was conveyed to the trustees for 99 years, if she should live so long, as a further security for her children; the estate likewise purchased by her of *Scot*, with a view, as she said, to have made good the marriage articles of her son, was conveyed to trustees for that purpose. The trustees (the childrens demand satisfied) were to stand seised of the surplus to the use of the mother. All the stocks that were transferrable, were transferred next day.

The 6th of *December* Mrs. *Cock* became a bankrupt; the children of Mrs. *Cock* bring their bill, to have this deed established, and to have the preference of Mrs. *Cock*'s creditors.

Great question was, Whether a deed made by a mother.

for securing just debts due to children at a time she had fears of becoming a bankrupt, (though two months before she actually was so) should be set aside, or established against the rest of the creditors?

It was argued in favour of the children, That this deed being made two months before any act of bankruptcy, and for securing that, to which the children had a just demand, was a good deed. Argument in favour of the deed.

It was said, if the specifick assets of her husband and brother had remained in her hands, unblended and unmixed with her own, and then this misfortune had befallen her, there could have been no question, Whether the childrens estate could be subject to the mother's debts; and therefore the question can only arise, from the mother's having blended and mixed those assets belonging to her children, with her own estate and trade.

* And since this was an act, that it was impossible for the children to prevent, and from whence they could not receive the least possibility of advantage, but might be very great sufferers, the mother, * P. 492.

Easter Term 8 Geo. I.

ther, if she has been guilty of it, has broken the trust reposed in her.

Now if the mother, being sensible of this, has by this deed endeavoured, as in justice and conscience she ought, to prevent any inconvenience they might otherwise have been liable to, from that wrong she had done them, in mixing their estate with hers, *this* as it is an act of justice to her children, will be always favoured in this court.

It would be very strange to say, That if Mrs. *Cock* has been guilty of a breach of trust, the assignees who stand in her place, shall take advantage of it, when she herself could not; and that in consequence of this, the estate of the children shall be vested in the assignees for their advantage.

This deed has done no more for the children, than possibly, what by a bill brought in this court, she might have been compelled to.

2 Vern 564.
Salk. 449.
Mortgagee or
purchaser
precedent,
though by de-
fective con-
veyance, pre-
ferred before
the assignees
of the com-
missioners of
bankruptcy.

The case of *Taylor* and *Wheeler* was quoted, as a strong case in favour of the children. *There* a copyholder in fee, surrendered to the use of the mortgagee in fee; but before the presentment of the surrender became a bankrupt. Lord *Cowper*, upon the question brought before him, Whether the assignees of the commissioners of bankruptcy should be preferred, or the mortgagee, decreed in favour of the mortgagee; because the assignees ought not to be in a better case than the bankrupt, who was bound in equity, by this defective conveyance.

So in the same manner, as to the stock transferred, Mrs. *Cock* being bound in law and equity; and as to *that* untransferred, in equity, the assignees who stand in her place, must be so too.

Econtra.

* Argument in favour of the assignees.

* P. 493.

As to the accounts that were said to be kept separate and distinct; it was said, That as these accounts were not binding on one hand with respect to the children, so on the other hand they ought not to prejudice the creditors.

These accounts were kept merely for the mother's satisfaction, and were intirely under her power. No part of the estate whatever specified by them to the children; and therefore they are not in the case.

Then it was argued, That the deed was void from the time, nature and end of it.

As to the time; it was made but two months before an actual bankruptcy, which in all probability she then foresaw.

As to the nature of the deed;

There is in it *suggestio falsi*; for that part of it, wherein she says, That the stock was bought with her childrens money, is entirely false; nor is the price mentioned, at which the stock is bought. So likewise, what she says, That she is but a nominal trustee for them,

Easter Term 8 Geo. 1.

them, is all false; for it does not at all appear, That this part of the estate, consisting in the stocks, was any ways appropriated to the children before this deed.

Another badge of fraud in this deed, is, That she plainly appears to be putting every thing out of her own power, and covering every thing by it; for her estate for life in land is by it vested in trustees, as a further security for the children.

As to the end of the deed; it is to give an undue preference to her children, who must be acknowledged to be creditors.

And as far as the preference is undue, *pro tanto* it is to defraud the rest of the creditors. And then this deed itself amounts to an act of bankruptcy; for it falls directly within the description of 1 Stat. 1 Jac. 1. Jac. 15. of a * fraudulent deed made on purpose to defeat or delay cap. 15. creditors. * P. 494.

Besides, this deed is plainly a voluntary one; for she was at a perfect liberty, Whether she would or would not make it.

And it is made to prevent that equality, which in a Court of Equity is always accounted the greatest equity.

As to the stock untransferred; it was said, That the assignees were within the common rule of equity, That having law and equity of their side, they ought to prevail against the children, who had an equitable right only.

As to the case of *Taylor and Wheeler*; it was said, That case differed from this. Ant. 492.

For 1st, there the money was lent upon that very security of the copyhold land; and there being an inchoation of a legal estate, compleat *quoad* the mortgagor or surrenderer, there was, as Lord Cowper observed, a *Lien* upon the land, and the mortgagee might have compelled a specifick performance; which in the nature of the thing is impossible here, one hundred pound stock being as good as another. And 2^{dly}, It did not appear, That the surrender was made upon a view of his becoming a bankrupt.

As children will reap the greatest advantage from their parents undertakings; so it is reasonable, That they should, at least as much as creditors, share in the misfortunes of their parents.

It was replied in favour of the children, That no deed could be a Reply. a fraudulent deed, so as to amount to an act of bankruptcy within the stat. *Jacobi*, but what would be esteemed fraudulent against a purchaser, by 27 *Eliz.* which it can never be said that this is.

The deed in stat. *Jacobi* is supposed to be a deed of trust, for the advantage of the bankrupt, and to avoid * the payment of debts: Stat. 27 Eliz. Stat. 1 Jac. 1. cap. 15. But this is a deed in trust for creditors, and for the payment of debts. * P. 495.

Nor will the preference created by this deed make it fraudulent. For an executor may by law, among debts equal in their nature,

Easter Term 8 Geo. 1.

give a preference to which he pleases ; nay by confessing judgment to a creditor by simple contract, he may give him a preference to creditors of a superior nature.

Every man by paying a debt, when he owes others, gives that creditor a preference.

If paying of the children, if they had been of age to receive it, had been lawful for the mother, as most certainly it had, the giving security for the doing of it, must be lawful too.

She was so far from being a bankrupt at the execution of this deed, that it is plain, she did not think of becoming one at the time ; for if she had, she never would have sent her 40,000 *l.* to have supported her brother's credit.

Salk. 449. The case of *Taylor and Wheeler*, reported by *Salkeld*, is a strong case ; for there the mortgagee had no more estate in law in the land, than the children have here in the stocks untransferred.

Articles of agreement for a jointure, have been held good against assignees, though legal estate in them.

Court. Lord Chancellor *Parker*, after giving a narrative of the state of the case, observed, That the clause of the will, that directs the childrens fortunes to be placed out by Mrs. *Cock*, with the consent of the major part of the guardians, to interest, or other way of improvement, must be understood exclusive of trade ; so that it was plainly never the intention of the father, That the fortunes of the children should be hazarded in the way of trade.

* P. 496. He observed further, That whoever traded with her, knew that she had but one third of her husband's estate ; and therefore gave her credit upon account of * that third only. And for her to have hazarded the fortunes of her children in trade, had been a plain breach of trust in her.

He took notice, That upon the death of the father, there was a great part of his estate in the publick funds ; and that in the year 1720. she had a great deal of money in the funds, which as to a great part of it, might be the very original stock of her husband, or at least stock replaced in the room of it.

It is plain, That as her ruin was owing to the bankruptcy of her brother, she hoped this might have been prevented, by the speedy supply of 40,000 *l.* which she sent him at this time. If she had not thought this, it was directly flinging away so much money. So that this deed cannot be said to have been made, upon a certain view of her becoming a bankrupt. Fears, indeed, she could not but have ; she might think, That though her brother did assure her, that this supply would support his credit ; yet possibly it might not. And therefore at a time when she was striking this bold stroke to save her brother, it was but just and prudent for her to resolve in all events, to secure what was due from her to her children.

The

Easter Term 8 Geo. I.

The objection against this deed, that it is a fraudulent one, and within the statute of 1 Jac. 1. cap. 15. because made so near the act of bankruptcy, a very frivolous one; for the deeds meant by that statute, are deeds made to defraud creditors, whereas this is a deed made to secure a just debt. Stat. 1 Jac. 1. cap. 15.

But it is objected, That this deed is made to give an undue preference to her children.

I know not what law or reason there is to favour this objection. Any body may make his creditor executor, and then the law gives him a preference; and not only so, but the law allows this executor to give any other creditor, in equal degree, a preference. It is true indeed, sometimes this court will interpose, because these powers may be an inlet to fraud; but this court * will never take from the executor himself this preference the law gives him. * P. 497.

Is not paying of a debt, giving that creditor as great a preference as giving security? And yet it was never pretended, that paying of a debt should be held an act of bankruptcy, because but two months before the bankruptcy.

But it is said, that this is done for children; and they are the fittest persons to suffer in their parents misfortunes.

Case of children is always favoured in a court of equity; they are esteemed as creditors of the parents by nature: If a man by his will gives copyhold lands to his younger children, the court will compel the heir at law to surrender to them. Very strange doctrine, that the plaintiffs, because creditors by nature as well as justice, should be in a worse condition than other creditors. Very strange, that it should be esteemed a fraud in a parent, to follow the voice of nature; especially when in doing this, she does but what duty and justice require from her, as their guardian and trustee. If the mother had been going to sea, and had made this provision for her childrens security, the very same objections might have been made.

A man that knows he must be a bankrupt may by law pay off any of his creditors. And this power as it may be abused, so on the other hand, may be very properly executed; there may be particular obligations in point of gratitude, &c.

Assignees can take nothing, but what the commissioners can assign; and the commissioners can assign nothing, but what the bankrupt could *bonestly* assign to them.

If Mrs. Cock had transferred (subsequent to the deed) this stock, for a valuable consideration to persons without notice, it had been a valid but *knaveish* act.

* Agreement to transfer stock, transfer wanting; agreement to surrender copyhold, surrender wanting, cases both alike; and therefore, as the court will compel a surrender, so it will a transfer. * P. 498.

He said, that a purchaser's being decreed to hold the land against a judgment, confessed between the time of articles and the conveyance, was a very strong case for the plaintiffs.

Easter Term 8 Geo. 1.

He called the deed an honourable deed ; and established it through-
out.

Trinity Term

8 Geo. 1. *In Chanc.*

Le Croy versus Eastman.

* P. 499. **L** E CROY bought 990 *l.* *South-Sea* Stock of *Le Grand* ; but not caring to have this stock in his own name, it was at his desire transferred to the defendant ; from whom the plaintiff took a note, declaring that he was a trustee of this stock for the plaintiff ; and that he would be accountable to him for the stock and produce. Afterwards when the stock was sold for about 600 *l.* *per Cent.* the plaintiff desired that the defendant would transfer the 990 *l.* stock to him : The defendant accordingly transferred 500 *l.* of this stock, and told the plaintiff that it would be inconvenient to him at that time, to transfer more, but that it was all one, for he would be accountable for the stock ; and advised the defendant as a friend, not to part with that 500 *l.* stock, which he had transferred to him, for he was very sure stock would rise very considerably ; which advice the plaintiff admits he so far followed, as that the 500 *l.* was still unsold believing the defendant to have a greater insight into these matters than himself. Upon the fall of the stock, the plaintiff brings his bill against the defendant, praying that he might account for the 490 *l.* stock at the price the stock then went, *viz.* 600 *l.* insisting that when the defendant told the plaintiff, that he would be accountable for the stock, he understood him to mean at the price the stock then went.

The question was, whether a trustee of *South Sea* stock should answer the value of the stock when sold by him ; or only be accountable for stock and Dividends ? Resolved in favour of the trustee, upon the circumstances of the case.

Trinity Term 8 Geo. I.

It appeared by the defendant's answer, that the defendant had, some time after he was a trustee, mortgaged 1000 l. stock to the *South-Sea* company for 4000 l. and that afterwards the defendant sold out all the stock he had in his own name, except 80 l. but that he had more than stock enough in another person's name, to have answered the trust, if the plaintiff had insisted upon a transfer. And he now offered to transfer to the plaintiff the 490 l. stock and produce.

Lord Chancellor *Parker*.

Not material to prove at what rate the defendant sold the stock, for the sale was at his own risk. If the stock had rose he would still have been accountable for the stock, not the money; and therefore as he must have stood to the loss in case of the rise of stock, reasonable he should reap the advantage upon a fall.

Indeed, if the plaintiff has sustained any loss, by the trustees meddling with the trust stock, he ought to have a satisfaction for it: But nothing of this appears; * on the contrary he believing stock would still rise, has the 500 l. stock actually transferred, by him unsold to this day; as probably for the same reason, he would have had the 490 l. stock still by him, in case that likewise had been transferred to him. P. 500.

Extremely hard to conceive, That when the defendant told him he would be accountable for the stock, he should understand him of the money arising from the sale of the stock; when it is plain, he took the defendant's advice of not selling, and believed the stock would rise; and therefore would naturally desire, as in reason he might, that the defendant would be accountable for the stock.

I take it to be very plain, That the defendant has not sold, but mortgaged the trust stock. For since there is no specifying one hundred pound *South-Sea* stock from another, a court of equity will never adjudge a man to have broken his trust in a higher degree, when he may with equal reason be adjudged to have done it in a lower; and therefore the stock mortgaged must be esteemed the stock of the plaintiff, the stock sold, that of the defendant.

The defendant must only account for the stock and produce. Let both sides bear their own costs.

In case the defendant had failed, and the stock been worth redeeming, he thought the plaintiff would have had a clear title to redeem; but then the company must have had notice of the trust.

Trinity Term 8 Geo. I.

* P. 501.
See 9 Mod. 4.

* *Gore versus Gore. In Canc.*

Devise to trustees and their heirs for 500 years, for payment of 50 l. per ann. to eldest son of testator during his life; and after determination of the said term, to the use of the first son of the body of

WILLIAM GORE had issue *Thomas* and *Edward*; and being seised in fee of certain lands, he devises his lands to two trustees and their heirs for the term of 500 years, for the payment of 50 l. per ann. to the eldest son during his life, the remainder from and after the determination of the said term, to the use and behoof of the first son of the body of the said *Thomas* his eldest son to be begotten, and the heirs males of the body of the first son; remainder to the second, third, and so on to the tenth son over in tail; and for default of such issue, remainder to *Edward* his second son. *N. B.* When the testator died, his eldest son *Thomas* had no issue; but since his death had issue a daughter, and very likely to have more children.

the eldest son to be begotten, &c. Remainder over to the second son of devisor. The eldest son had no male issue at the time of the testator's death. Judges of B. R. of opinion, that the remainder to the first son, &c. was a void remainder; and that the remainder to the second son was a vested remainder. But Lord Chancellor thought the intention of the testator, that the issue of the eldest son should not be disinherited, ought to be supported if possible.

Lord Chancellor *Parker* made a case of it, and sent it to the judges of the King's Bench for their opinion.

The judges certified their opinion to be, That the devise to the first son of *Thomas Gore* was void; for it could not take effect as a remainder, because there was no freehold to support it; nor by way of executory devise, because it was not to take place within that compass of time the law allows for that purpose. They declared likewise their opinion to be, That the remainder to the second son was vested in him on the death of the testator.

When the cause, upon the certificate of the judges, came back into chancery for the direction of the court, the attorney general *Sir Robert Raymond* was going to argue against the opinion of the judges; but

* P. 502. was * stopped by the Lord Chancellor, who told him, That he thought he must be concluded by the opinion of the judges.

He admitted, That in case he had sent for the judges to have assisted him in the hearing of the cause, and the reason of the judges had not convinced him, he must have acted according to his own understanding, for it was to be his decree, not theirs, (and this the Lord *Nottingham* did in the case of the Duke of *Norfolk*) but that *here* he was not at that liberty; having not heard the arguments at law before the judges, nor been acquainted with the grounds, on which their opinion was founded; and that he looked upon the judges *here* in the nature of referees.

Upon further debate of the case, the Lord Chancellor said, it was as undoubtedly the intention of the testator, That the issue of the el-

dest

Trinity Term 8 Geo. I.

deft son should not be disinherited, as it was that the eldest son should : That the intention of the testator, if it could possibly, by rules of law, ought to be supported, being a very reasonable one ; and that judges have been commended for being *astuti* in doing this.

Upon this it was said, If the son of the eldest son should take when born, it must be by way of executory devise ; and then the consequence must be, that the eldest son would take until a son was born ; whereas the testator plainly intended him nothing.

Lord Chancellor : I do not know, Whether this be a necessary consequence. And whether I cannot take a middle way, and as there is a precedent term, decree that after debts paid, the trustees shall be accountable to the after-born son for the profits. Let it stand over.

Afterwards the parties agreed before any thing more was done in it.

* *Lewis versus Lord Lechmere. In Canc.*

* P. 503.

THIS was a bill brought by the plaintiff for a specifick performance of articles, bearing date the 30th of *August* 1720, whereby the Lord *Lechmere* had covenanted to purchase such an estate at forty years purchase ; provided the plaintiff did, on or before the 10th of *November* following, lay such an abstract of the title before Lord *Lechmere's* counsel, as they should approve.

Bill for specifick performance of articles for the purchase of an estate, dismissed with costs ; because the title was not laid before the vendee's counsel within the time limited.

The Bill was dismissed with costs ; because the plaintiff had not laid his title before Lord *Lechmere's* counsel, within the time limited by the articles ; which time, the Lord Chancellor was pleased to say, was very material ; the price of *South-Sea* stock, from whence the money for the purchase was to be raised, being upon the 10th of *November* 260 *l. per cent.* and at the time of the hearing the cause, but 92. *l. per cent.*

Tho' this was *that*, upon which the chancellor was pleased to found his decree ; yet there were several other things in the cause.

It was insisted upon by the counsel for the defendant, that the greatness of the price, double the value of the land, was reason enough for a court of equity not to interpose, so as to enforce a specifick performance ; *that* being intirely a discretionary power, and what the court *ex debito justitiæ* is not bound to do.

1st point. Whether it be consistent with the rules of equity to decree a performance in specie of so

extravagant and unreasonable a bargain as a sale of land at 40 years purchase ? This point not determined here ; but see 2 Vern 423.

It was acknowledged, that no decree had been made purely upon this point ; but it was said, there were several cases, where this circumstance had great weight with the court.

In

Trinity Term 8 Geo. I.

* P. 504. In the case of *Hanger* and *Eyles*, of the last term, where the vendor brought his bill for the money, tho' the decree was founded upon the vendor's not being * able to convey a manor, according to his covenant; yet it being acknowledged, that this manor was of little or no value, it is evident, that the other circumstance in the cause, the unreasonableness of the price, was *that* which really inclined the court, to lay hold upon a point, too inconsiderable otherwise, to have been taken notice of.

In the case likewise of *Hicks* and *Philips* of the last term, which was a bill brought by the vendor for a specifick performance of articles, the bill was dismissed; because the vendor had covenanted to convey freehold, and one acre or two proved copyhold; even tho' the vendor offered to procure an enfranchisement of this land, or make any compensation in the price; which shews the regard had by the court, to this other circumstance attending the case, viz. the unreasonableness of the price.

As to this point it was answered by the counsel for the plaintiff, that if a court of equity were to set aside agreements upon this account, it would make all transactions precarious and uncertain, and invest a court of equity with a very arbitrary power; the value of money and land being always various and uncertain.

That if any measure was to be laid down in this case, the point to be considered must be, Whether the contract was an unreasonable one at the time it was made.

* This decree of the exchequer reversed in the House of Lords. See *Gillb. Rep.* in equity 155. 156. 2d point.

And accordingly upon this ground, it was lately determined in the court of exchequer, in this case of *Keen* and *Stuckley* *, That they would enforce a specifick performance of these contracts, if the price was reasonable at the time the contract was made, how disproportionate forever after accidents might make it.

* P. 505. It was insisted upon by the counsel for the plaintiff, that the clause making void the articles, in case the plaintiff did not, by such a time, lay such an abstract of * the title before the counsel of the defendant, as they should approve, had been obtained by fraud and surprize, and was an unreasonable clause.

As to the fraud and surprize they failed in their proof; but insisted upon the unreasonableness of it; because tho' the title was never so clear and good, yet if the counsel of the defendant should disapprove of it, or give no opinion of it at all, the articles must be void.

Covenant to make such a title to an estate as the vendee's counsel shall approve of,

But to this it was answered, that the meaning of this clause was no more than that the plaintiff should make out a good title; for if the counsel should be supposed to act unreasonably, and to disapprove of a good and clear title (such a title as a court of law or equity means no more than that it must be a good title, and fit to be approved of; so that if the counsel disapprove without reason, the vendee notwithstanding will be bound by his bargain.

would

Trinity Term 9 Geo. I.

would take to be a good title) yet the defendant would be bound notwithstanding the disapprobation of his counsel.

It was said by the counsel for the defendant, that tho' in case of articles entered into for the purchase of lands, the vendee may undoubtedly exhibit his bill in equity for the specifick performance of these articles; yet it might admit of a doubt, Whether the vendor might do the same.

As to the vendee, tho' he has an action at law upon the articles, yet *that* sounds only in damages; and therefore he may come into equity for the land, which on several accounts may possibly be more desirable to him, than any pecuniary compensation.

But for the vendor, he only desires to have the money; and *that* whether it be recovered at law in damages, or in equity, is but money still.

but the other wants nothing but the money, which he may recover at law in damages. But this was determined in favour of the vendor; because upon mutual covenants there ought to be mutual remedies.

* If it be said, that at law the jury may at their own liberty and discretion, give him what damages, they upon all the circumstances of the case think reasonable; whereas upon a bill in equity, your lordship has no power to vary from the sum contracted for in the articles, be the circumstances of the case what they will: * P. 506.

This seems to be a very odd reason for coming into a court of equity, and the reverse of what generally intitles people to relief in equity.

But to this it was answered, that upon mutual articles there ought to be mutual remedies: That if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too: That the remedy the vendor had at law, was not a remedy adequate to what he had in this court; for at law they only could give him the difference in damages, whereas he might for particular reasons stand in need of the whole sum.

Besides, by the articles the land is bound, and the vendor is in nature of a trustee for the vendee; and whether a recovery in an action of law upon the articles, may make him cease to be so, is not entirely clear.

Lord Chancellor was of opinion, That the remedy the vendor had at law upon the articles was not adequate to *that* of a bill in equity for a specifick performance.

However he dismissed the bill, upon the point above mentioned at the beginning of the case.

* P. 507. *

Michaelmas Term

9 Geo. I. Cur. Canc.

Hobson & ux' versus Trevor.

1. l. 2. P. W. 191. 1. 533.

Bill for specific performance.

THIS was a bill brought for the specific performance of an agreement, made upon the marriage of the defendant's daughter with the plaintiff. The case was this :

T. in consideration of H.'s marrying his daughter, enters into a bond to H. to settle, &c. one third of whatever estate should come to him upon the death of his father. Decreed that the condition of this bond should be specifically performed ; for the design of the agreement of which this bond was an evidence, being to make lasting provision for wife and children, could never be satisfied by the forfeiture of the penalty, which would be all the husband's.

* P. 508.

Trevor gave encouragement to the plaintiff, a young gentleman under age, son of Sir Charles Hobson, esteemed a man of very good substance, to make address to his daughter ; and promised him, in case he would marry her, that he would settle upon him and his daughter, the third of whatever estate should come to him, upon the death of his father the master of the rolls ; and did accordingly enter into a bond to him, before the marriage, in the penalty of 5000 l. whereof the condition was to this effect. Whereas it is agreed between the defendant and the plaintiff, that in case a marriage, intended to be had between the defendant's daughter and the plaintiff take effect, the defendant should within three months after the death of his father, settle one third of whatever estate should come to him, upon his daughter and the plaintiff for the term of their lives, and the longest liver of them ; remainder to the issue of the body of his daughter, &c. and for default, &c. to the right heirs of the defendant Trevor. Now the condition of this obligation is such, that in case such settlement shall be made, &c.

Upon the death of the master of the rolls, Sir John Trevor, so considerable an estate fell to the defendant, as that the third amounted to about 1600 l. per annum. And therefore the plaintiffs prayed a specific performance of the articles, insisting that the forfeiture of the penalty, would not answer the end of this agreement ; for that being

Michaelmas Term 9 Geo. 1.

being money, would go as money to the executors of the husband, and be entirely under the husband's power; whereas the intention of this agreement by the nature and manner of it, was to make a lasting provision for wife and children. And it was insisted that this bond was a plain and sufficient evidence of this agreement.

The defendant insisted, that this agreement was not absolutely to settle, &c. but to settle, or in case he did not, to forfeit the penalty of 5000 *l.* For the defendant.

The penalty of the bond, in the very nature of it, seems to be a sum fixed upon, by the parties themselves, upon the payment of which, the party bound shall be loosed from his obligation. And if this is to be intended in any case, it seems reasonable to intend it here, where not a shilling is settled, or agreed to be settled by the husband; so that this whole provision is on the defendant's side, a perfect bounty.

It was said, that the father of the young gentleman, tho' once a rich man, had the misfortune to lose most of what he had, in the hands of a banker that failed.

It was urged, That agreements to make settlements in the life-time of parents, and before any estate descended, were of ill consequence, and by no means to be favoured or supported in a court of equity.

* As to the objection, That the forfeiture of the penalty, would not answer the design of the parties, which was to make a lasting provision for wife and children: It was answered, that since the 5000 *l.* (the penalty) came in lieu of the settlement, it would be in the power of this court, upon a proper application, to have the 5000 *l.* settled in the same manner, for the benefit of the wife and children. * P. 509.

But it was strongly insisted in behalf of the plaintiff, that the agreement of the parties was to make the settlement; and not to make the settlement, or forfeit 5000 *l.* For the plaintiff.

That this plainly appeared, by the recital of the bond, to be the agreement.

That the end and design of the agreement, was the making a provision for wife and children, which would not be attained by the forfeiture of the penalty; for that would be a debt due only to the husband, and subject intirely to his disposal. Very strange to imagine, That the defendant should insist upon a provision for his daughter and her issue, in case less than 15000 *l.* descended to him from his father; but in case more than that, he should take no care at all of her, but leave her intirely to the mercy of her husband. For this the plain consequence of supposing the agreement to be, either to make the settlement, or forfeit the penalty; since in case the defendant chooses to forfeit the penalty, then the only provision for the wife

Michaelmas Term 9 Geo. I.

wife and children is this penalty ; which being a debt due to the husband, the court of chancery cannot oblige him to settle it, in the same manner as the land.

If the circumstances of things as they stood at the time of making this agreement, and the nature of this agreement be considered, it will appear not only to have been a reasonable agreement, but an advantageous on one the side of the defendant.

* P. 510. * The plaintiff was the son of Sir Charles Hobson, a very rich man; and tho' he had very considerable losses afterwards, yet it does not appear in the cause, but that this might be after the time of the agreement : So that there was a fair expectation ; and his son was put out to a wholesale linnen drapper, a very good trade, and requiring a very good stock to set up with.

As to the settlement from the plaintiff, there was none to be expected, he being under age ; but in consequence of his trade, he was to be a freeman of *London*, and *that* would be a provision.

As to the defendant ; it is well known, that tho' he was eldest son to the late master of the rolls ; yet he was under his father's displeasure, and so not likely to have any thing at all, or at least but a trifle from his father.

And this is another plain evidence, that this agreement was to settle, not settle or forfeit ; for his expectations being so small, the penalty of 5000 *l.* must have been esteemed by the parties, as a sufficient security, to enforce the performance of this agreement ; and it is impossible to suppose, that the defendant could be then providing in his thoughts for that election now insisted upon.

As to the nature of the agreement, highly reasonable. A father upon the marriage of a daughter, his only child (and very like to continue so) agrees to settle a third of his estate upon a double contingency ; 1st, the death of his father before him ; for if his father had outlived him, the whole agreement was void. And 2^{dly}, In case any estate came to him from his father ; for in case none came, as there was too much reason to fear, then the agreement was likewise void.

Upon this double contingency, a father agrees, upon the marriage of his daughter and only child, to settle one third of what he should have upon the death of his father, upon her and her husband for term of their lives, and the longest liver of them, then to the issue * of that marriage in tail, reversion to his own right heirs.

* P. 511. Here is nothing agreed to be settled but upon his own child ; the very reversion is to his own right heirs. The husband has only an estate for life ; and in case of issue, the law itself had done as much for him, in making him tenant by curtesy.

This is an agreement made by one of full age, and not a child ; a father upon the marriage of his daughter ; and therefore not like the cases of young heirs, unwarily drawn in, in the life-time of their parents, to part with reversions.

Michaelmas Term 9 Geo. I.

The defendant himself encouraged the match ; looked upon it to be so advantageous, as that he thought it reasonable to have settled half instead of a third ; and bragged how well he had provided for his daughter, in case his father should die and leave him nothing.

Lord Chancellor *Parker* decreed the land to be settled pursuant Court. to the condition of the bond. Declared, that if the agreement had been to have made the settlement, or forfeited the penalty, it would have been a debt due to the husband, and not in the power of the court to have taken care of the wife and children, by ordering the 5000 l. to be settled.

Q. of this, it coming in lieu of the settlement.

* Hilary Term

* P. 512.

9 Geo. I. *In Cur. Canc.*

Cartwright versus Cartwright.

l. 2. p. 132. when it was first heard.

7. S. devises to trustees and their heirs, for the life of Sir *Charles* Roman Ca-
tholicks.
Cartwright, and two years longer ; and then taking notice, that the children of Sir *Charles Cartwright* were all beyond the seas educated Roman Catholicks, directs, that in case any of the sons of Sir *Charles Cartwright* should within those years become a protestant, and receive the sacrament according to the usage of the church of England, then the trustees were to hold the estate in trust for such son in tail ; remainder over, &c. And in case no one of the sons should conform ; then in case any one of the daughters should within those two years become a protestant, and take, &c. in trust for

that daughter in tail ; remainder over, &c. And then he charges his estate with some annuities, payable to the sons and daughters of Sir Charles. Sir Charles dies, no one of his sons did within the two years become a protestant, or receive the sacrament, &c. but one of the daughters did within the two years receive the sacrament twice according to the usage of the church of England, and the trustees

* P. 513. * actually permitted her to receive the rents and profits of the land.

This daughter brings a bill in equity, against the trustees, and all the children, and one in remainder being an infant, (who had a right to the estate in case the daughter was not well intitled to it) to compel the trustees to convey to her, in order to enable her to dock the entail, by suffering a common recovery, and so make a good title to a purchaser.

The trustees by their answer own, that they had permitted the plaintiff to receive the rents and profits, conceiving she was well intitled thereunto, by having received the sacrament, &c. the test pitched upon by the testator, of the sincerity of her conversion : Pray that a receiver may be appointed ; and that they may be discharged of the trust.

The children all by their answers consent to the sale of the estate, and that the trustees may convey ; the daughter having given a bond to pay the sum of 1500 l. in satisfaction of the annuities given to them, and charged upon the estate.

Lord Chancellor Parker :

I am not satisfied of the reality of the conversion of the daughter. As to the proof offered for it ; no more than the bare act of having received the sacrament twice ; an act very common for Roman Catholics to do upon a worldly motive, and then we hear no more of them. Remarkable, that the witness who swears to her conversion, does not say that he believes her now to be a protestant ; but that four years ago she was one. The readiness of the children in their answers, to do what is desired of them, looks very suspicious. As to the bond given for the payment of 1500 l. I much suspect a defeasance in case this bill miscarry ; and indeed I do not * see any consideration for the giving it ; for the annuities charged upon the land, are certainly profits arising out of land ; and the children being all Roman Catholics, the devise is void as to that.

* P. 514.

Indeed, if the daughter had had a clear title, and her conversion been out of doubt, there was no occasion for coming here ; for if the daughter had suffered a common recovery, or levied a fine of the trust in tail, it had been binding in equity.

Let a receiver be appointed, I will consider further of the decree.

It

Hilary Term 9 Geo. I.

It was pressed by the counsel, that in the mean time they might have liberty to give further evidence of the sincerity of her conversion; and they quoted the case of *Rawlinson* and *Rawlinson*, before Lord *Cowper*, where that liberty was indulged.

Lord Chancellor: I will do nothing now.

* Michaelmas Term

* P. 515.

10 Geo. I. *In Cur. Canc.*

Parks and Wilson.

See 9Mod.
62.

A. And *B.* brother and sister; *B.* the sister has issue two daughters, and one son called *Anthony*. *A.* the brother being seised of an estate of copyhold, and intending that not his sister who was his heir at law, but *Anthony* her son should have the land, resolved to surrender it to the use of his will, and devise it to *Anthony*; but the officers of the court being out of the way, and a surrender not practicable, the mother consented to enter into a bond to her son, that she would at any time upon the payment of 200 *l.* and upon the request of *Anthony* her son, surrender the estate to him.

Bill for specific performance.

This bond was executed in *November* 1713, about which time *A.* died. After his death, *Anthony* the son received and enjoyed the rents and profits of the estate during the life of the mother; but no surrender was ever made by the mother to *Anthony* in pursuance of the condition of the bond; nor was there any request for her so to do.

* *Anthony* dies without issue and intestate, and his mother took out letters of administration; and likewise after his death, she got herself admitted, and entered upon the land, and received, the rents and profits; and then devises the land to one of her daughters and dies.

The

* P. 516.

Michaelmas Term 10 Geo. I.

The other daughter, and sister of *Anthony*, brings her bill against her sister the devisee of her mother, praying to have a decree for a surrender, and proper conveyance of a moiety of the land, which she would have been entitled to, had her mother surrendered to *Anthony* her brother, as she ought to have done, in pursuance of the condition of the bond for that purpose entered into.

For the plaintiff.

It was argued in favour of the plaintiff, that from the nature of the case, it appeared plainly to be an agreement between *A.* and his sister, that her son should have the land; and that in a court of equity, this bond would be interpreted as an undoubted evidence of this agreement; and that there were several instances, where bonds had been considered in this light by the court.

1 Vern. 296.

It was said, that in the case of *Tbynn of Eggham*, a person, being made executor upon an antecedent promise, that he would not thereby take any advantage with respect to any part of the personal estate, but let such a one have it; it was held that this promise made him a trustee in this court.

It was further insisted upon, that the mother's permission of the son to receive and enjoy the profits of the land, was a carrying this agreement into execution, which made it a much stronger case.

And then if *Anthony* himself, had a right at any time during his life, to have come into this court, and insisted upon the specifick performance of this bond; certainly death, the act of God, shall not in this court put his heir in a worse condition.

* P. 517.
For the defendant.

* For the defendant it was insisted, that by the evidence it did indeed appear, that it was once the design of the uncle, to have given his nephew this land; but that afterwards he changed his mind, and gave him this bond in the room of it.

It was said, that this bond, being gone in law, upon account that *Anthony* being dead intestate, the mother the obligor had taken out letters of administration; and also by reason that there was no request made by *Anthony*, during his life, for the surrender; ought not to be set up in equity.

It was said, That possibly, *Anthony* having by his mother's consent enjoyed the profits of the land, without having ever paid the 200 *l.* might for that reason make no will; as conceiving that the bond being thereby extinguished, there would remain no obligation upon the mother to surrender.

Lord Chancellor *Parker* :

Court.

Plain from the nature of this transaction, That it was the fixed intention of the uncle, that one way or other, his nephew should have the land. In order thereunto he attempted more than once to surrender to the use of his will, resolving to devise it to his nephew; but a surrender not being practicable, by reason of the accidents set

Michaelmas Term 10 Geo. I.

forth in the evidence, he then had recourse to this bond, as the next best method to secure it to him. So that this bond is not to be considered, as something given in lieu of the land, which the uncle once intended him, but as another medium of securing the land to him; and on the part of the mother, it amounts plainly to an agreement, That the son should have the land.

The consequence of which will very plainly be, That the mother must be considered by this court as a trustee for her son; and then I shall have no regard at all the niceties of law, of the bond's being extinguished and * gone either by the obligor's being administratrix * P. 518. to the obligee, or for want of a request. The authorities are many in this court, That bonds have been considered as evidences of agreements, and obligors held to a specifick performance, and not allowed to forfeit the penalty.

There must be therefore a surrender and conveyance: But then the plaintiff must pay the 200 l. with interest from the death of the uncle; *Anthony* having during his life, by the consent of the mother, received and enjoyed the profits of the land.

Atcherley versus Vernon & al. In Canc.

MR. *Vernon* made his will January 17, 1711. and by this will he vested the bulk of his estate, real as well as personal, in five trustees, for the use of *Bowater Vernon*, &c. and also he gave the residue of his personal estate to the same trustees, to be invested in land, and settled to the same uses.

He gave his wife 500 l. to be paid her presently by the trustees; and 1000 l. per Annum, free from all taxes but parliamentary ones, in full satisfaction of dower, jointures, and all demands out of his real estate, to be paid by the trustees. He gave her also all his plate, and his *London* house, and the goods and furniture; he gave her likewise the use of his house at *Hanbury*, with all the demesne lands and park that he kept in his own hands, with all the goods and furniture, together with the books, for her life.

He gave his sister and heir at law, Mrs. *Atcherley*, 200 l. per Annum for her separate use; and his niece *Leticia Atcherley* 1000 l.

After the making of his will, he purchased several estates in land; some of which purchases were compleated, and the conveyances executed in his life-time; * but in some they were only contracted * P. 519. for, part of the purchase-money paid, but no conveyance executed; and in some the time limited by the articles for executing the conveyance was not come.

Fort. 188.

Com. 987

513.

Sec. 9 Mod.

68. S. C.

The case

is a case in Chanc.

on this will; but the point

differs.

Michaelmas Term 10 Geo. 1.

He purchased likewise a copyhold estate; but that purchase was compleated, save that he was pleased, that the vendor's name should be made use of in trust for him.

Mr. *Vernon* being seised of the manor of *Hanbury* in fee, out of which there was payable to the crown a fee-farm rent of 35*l.* per *Annum*, purchased this in, and took a conveyance of this fee-farm rent to himself in fee.

Matters standing thus, Mr. *Vernon* on the 2d of February 1720. added a codicil to his will.

In which codicil he first takes notice, That he had made his will, bearing date on or about the 17th of January 1711. and ratifies and confirms this his will in every part thereof; save what alteration he should make by that codicil.

He further takes notice, That he had by his will given his sister and heir at law 200*l.* per *Annum* to her separate use, during her life, and 1000*l.* to his niece *Leticia Atcherley*; and by his codicil makes the 200*l.* 400*l.* in case she survived her husband; and encreases the sum of one thousand pounds to six thousand pounds to be paid his niece, upon day of marriage or 21. And then declares, That his will and meaning is, that the respective legacies of 200*l.* per *Annum*, and the six thousand pounds, be taken and accepted of by his said sister and niece, in full satisfaction of all manner of claims and demands, they or either of them had or might have upon any part of his estate, real or personal; and upon condition that they do release unto his executors and trustees all manner of claims and demands, upon any part of his estate.

* P. 520.

* Then he goes on and says,

Having thus provided for my sister and niece, I do devise all the lands purchased by me since the making my will, to the trustees in my will named, to and for the same uses and purposes as the manor of *Hanbury* stands settled by my will. And I do hereby revoke that part of my will, wherein I make *A. B.* and *C.* three of my trustees; and I do desire *J. S.* and *J. N.* to be two of my trustees, and do devise my said real estate to them accordingly.

1st Point,
How much of
the will stood
revoked by
those words
of the codicil,
I do hereby revoke that part of my will, wherein I make *A. B.* and *C.* three of my trustees.

Upon this will and codicil, the first point insisted upon by Mr. *Atcherley* in right of his wife, sister and heir at law to Mr. *Vernon*, was founded upon that part of the codicil, *I do thereby revoke,* &c.

I do hereby revoke that part of my will, wherein I make *A. B.* and *C.* three of my trustees.

It was insisted, That he had by these words revoked that integral part of the will, that related to the trust, and the uses thereby limited. Had he not intended to have done so, he would not have used those words, *that part of my will*; but would have used some other

Michaelmas Term 10 Geo. I.

other words, that would have manifested his intention to have related only to the persons of the trustees.

It was said, That if he had intended only this, it was very strange that he should repose any trust as to the new purchased lands, in those very trustees thus by him put out; yet *that* he plainly does, for he devises them *to the trustees in the will named, viz.* all five.

As the former meaning seems to be the more literal one, so it is the more favourable one to the heir at law, who will otherwise be disinherited by the will.

Where the words of a will are dubious, the heir at law to be favoured. 2 Vern. 340.

And it is likewise an interpretation, that makes the codicil uniform and consistent with itself. For immediately after this, there follows a new devise of all his estate to the two new trustees; which clause, supposing the former not to be a revocation, is plainly inconsistent, and itself a revocation. And as there is no new trust appointed by this new devise, the law implies *that*, and says to the use of the heir at law.

Where land is devised to trustees, and no use declared, the law will imply it to be to the use of the heir.

* But admitting, That the devise to these new trustees, by virtue of the word *accordingly*, should be taken to be, to and for the same uses and purposes as are mentioned in the will; yet in as much as the lands are devised to the trustees, only omitting the words *and their heirs*, they can take only an estate for life; and an estate for life cannot support a use in fee; at least the reversion upon the estate of the trustees for life, will descend on the heir at law.

* P. 521.

It being foreseen by Mr. *Atcherley's* counsel, That the clause of the release to be given by the sister and niece, would be urged as a plain proof that it was the testator's intention, that his heir at law should have nothing more:

They endeavoured to obviate that objection, by saying, That as the sister had then a subsisting demand upon the estate of Mr. *Vernon* (as it was admitted she had) it was probable, that the release was directed by the testator, with a view to *that* only, and not to any further claim; it being very unlikely to suppose, That a man who is Master of his own estate, and may dispose of it where he thinks fit, should order his heir to release, in order to cut him off from the estate; when the very devising of it away, does *that* as effectually as 500 releases possibly can.

On the other side, it was said by the counsel for Mr. *Bowater* *Vernon*,

For the defendant.

That a revocation was no more to be presumed than the disinherison of an heir.

That

Michaelmas Term 10 Geo. I.

* P. 522. That the only use of wills, is the disinheriting of heirs, and preventing that descent, which would otherwise fall upon them.

Inconsistent
and contra-
dictory
clauses in a
will, must be
so expounded
if possible, as
not to destroy
one another :
Therefore
if there be

two devises in a will of the same lands, the latter shall not be esteemed a revocation of the former, but the law will make the devisees jointenants.

It is the business of all courts, so to construe a will, as that the whole may be consistent ; and revocations arising from inconsistencies will never be admitted, but where the inconsistency is plain and unavoidable : * Therefore, if in the beginning of a will land is devised to J. S. and afterwards in the same will the same land is devised to J. N. the law will make them jointenants, rather than the latter part should be esteemed a revocation of the former.

But it is so far from being doubtful whether the testator did intend to revoke the dispositions in the will by this codicil, that it is very plain, from the whole tenor of it, that he intended the contrary.

In the very beginning of his codicil, he takes notice of the making of this will, and then ratifies and confirms it.

Then he makes an additional provision for his sister and niece ; and then directs that they *accept* the same *in full satisfaction*, &c. Words that very plainly and strongly import, that he intended them nothing more.

But if this intention of his can be plainer, he has made it so, by the *Release* he has directed them to give. For though possibly he might principally have in his view, the demand he then knew his sister had upon him ; yet when such general words are used, as comprehend every thing, it amounts to a demonstration, That he did not intend them the bulk of his estate. And not at all absurd to suppose, that not being able to foresee, what disputes might arise, what points might be started, how frivolous soever, he might even to prevent these, as far as in him lay, direct and appoint this release.

After this, he goes on thus, *Having thus provided for my sister and niece*, &c. Words plainly again implying, he never intended them any other provision.

The expression in the codicil *Three of my trustees* plainly implies, That the testator thought there remained more trustees, who had trusts reposed in them ; all which could not be so, upon supposition of a revocation.

The following expression, *to be two of my trustees*, corroborates the foregoing observation.

* P. 523. * But this observation stands yet further strengthened, from his appointing no new trusts for the new trustees. For upon supposition, That the testator did suppose, as it is evident he did, that his will was to continue ; and that some of the trustees in his will were to continue such, and to the same uses and purposes in the

Michaelmas Term 10 Geo. I.

the will mentioned; *then* was there plainly no occasion to declare any new use, but the bare making them trustees was abundantly enough; though if more were necessary, this one word *accordingly*, being a relative word to the uses in the will, is tantamount to the repeating them in the codicil.

Besides all this, his devising his lands purchased since the making of his will, to the same uses as his manor of *Hanbury* stands limited by the will, plainly proves, That the testator imagined that these uses were continuing uses; and that he was very well pleased with them.

Add to all this, That by interpreting this to amount to a revocation, the provision of a 1000*l. per Annum* made for his wife is quite overthrown; because it takes away the fund out of which it is to arise.

As to the objection taken from the omission of the word *Heirs* in the devise to the new trustees; it was observed, That a will is always to be interpreted according to the intention of the party; and that there is no legal form of words whatsoever necessary in a will (as in a deed there is) to pass a fee-simple; but whatever words make it plain, the testator intended it, will be sufficient for that purpose.

Not the same exactness required in the words of a will, as in those of a deed.
Salk. 621.

And therefore *here* a fee shall pass to the trustees, without the word *Heirs*; because impossible that any other estate could support the uses for which the estate was given them.

A devise of lands to trustees, tho' the words and the intention of

their heirs be omitted, shall convey an estate in fee to them, if that be necessary to support the intention of the testator.

Absurd to the last degree to suppose, a man should in one and the same breath, *viz.* the same codicil, ratify and confirm his will, and former disposition of his estate, and then overturn all at once; and *this* in favour * of his heir at law, for whom he had been providing in this very codicil, and declaring very fully and expressly, That he intended nothing else at all for her.

* P. 524.

The meaning of Mr. *Vernon* is so full and clear, that no one but a lawyer could ever have mistaken it. And after all, in order to mistake it, 'tis necessary to vary from the literal meaning of his words; for had he meant and intended what the other side would have had him, he ought not to have said, I hereby revoke that part of my will, but *that Clause*; for if it be asked what is that part of the testator's will, whereby *A. B.* and *C.* are made trustees, Is not the answer barely their names? So that in a literal sense, which is likewise the real and natural sense, no part of the will is hereby revoked, but that part of the will where these trustees are named, *viz.* their names. The bare naming them made trustees, and the revoking the naming of them, puts them out of the trust.

Michaelmas Term 10 Geo. I.

This point was clearly decreed by the Lord Chancellor in favour of Mr. *Vernon*.

Demise of a shilling to an eldest son in satisfaction of all claims, held sufficient to exclude him from his distributory share of the testator's personal estate.

In the arguing of this point, the case of *Vachel* and *Vachel* was cited by Mr. *Vernon*'s counsel; where, upon a bill brought by the eldest son, to have his distributory share of the personal estate, it was decreed against him upon this single circumstance, That the testator by giving him a shilling in satisfaction of every thing he might claim out of his estate, had manifested his intention to be, that he should have nothing at all.

2d Point, Whether a fee-farm rent should pass in a will by the word Lands?

* P. 525. For the plaintiff. There must either be express words in a will, or a necessary implication to disinherit, an heir at law.

2 Vern. 571.
3 Salk. 128.
Where a devise of the manor of F. passed a fee-farm rent issuing out of that manor; because otherwise the will must have been void, the testator being seised of nothing else in that manor but the fee-farm rent.

Another point insisted upon by Mr. *Atcherley*'s counsel was, That the fee-farm rent of 35 l. per Annum, issuing out of the manor of *Hanbury*, and purchased in by Mr. *Vernon*, did not pass to the trustees by the word *Lands*.

* It was said, That an heir at law, is never to be disinherited, but by very clear and plain words: That therefore the word *Land*, should never be extended to comprehend fee-farm rents, to the disinherison of an heir at law; unless where the word can relate to nothing else, and so otherwise be totally void. And upon that distinction went the case of *Inchly* and *Robinson*, 2 Leon. 41. and 3 Leon. 165. The devisor being seised of a fee-farm issuing out of the manor of *Fremington*, and of no other land whatsoever, devised his manor of *Fremington* to J. S. And it was there held, That the devise of the manor of *Fremington*, were words in a will, sufficient to pass the fee-farm rent issuing out of that manor; for the devisor being seised of that rent, and nothing else in that manor, it was plain, That the testator meant the rent, and could mean nothing else: So that otherwise the will must have been intirely void.

For the defendant. Merger.

To this it was answered by the counsel for Mr. *Vernon*, That Mr. *Vernon* the testator, being seised in fee of the manor of *Hanbury*, out of which this fee-farm rent did issue, had merged the rent in the inheritance, by taking a purchase of it to himself in fee.

But it was further insisted upon, That such a rent would very well pass by the word *Land*.

The case of *Inchly* and *Robinson* proves, That the word is sufficient to pass it, where the intention of the testator is plain that it should pass; for the word *Land* certainly as comprehensive as the words in that case, viz. the Manors of *Fremington*; nor could the circumstance of the testator's having nothing else to pass, more strongly

Michaelmas Term 10 Geo. 1.

strongly shew the intention of the testator, that it should pass in that case, than the release in the present.

Where a man had a portion of tythes in fee; held, That *that* * P. 526. should pass in a will, by the words *all my free Lands*. It is true Where the testator was seised of a portion of tythes in fee, and nothing else; Resolved

the testator had in that case nothing else; but that is a circumstance of no weight, any * further than as it serves to shew what the testator intended, which the release directed does abundantly in the present case, *Style 261*.

That that should pass by the words *all my Free Lands*.

The word *Livelihood* will pass land in a will. Fee-farm rent extendible upon an *Elegit*, and yet the words of the statute that gave the sheriff authority are only *Land, medietatem terræ*. Land will pass in a will by the word *Livelihood*. Stat. Westm.

2. fee-farm rents extendible upon an *Elegit*.

Lord Chancellor merged in the inheritance, and purchased by the Court, testator with a view that it should be so. Besides, the word *Lands* sufficient to pass it; especially in a will, and where the intention of the testator is so very plain, as here it is, that it should pass.

Another point insisted upon by Mr. *Atcherley's* counsel was, That 3d Point, the lands contracted for where no conveyance was executed, and Whether lands contracted for, but not conveyed, should pass by a devise in a codicil of all

especially those lands where the very time fixed by the articles for executing conveyances, was not come at the time of the making the codicil, did not pass by it; and consequently would descend to the heir at law.

the lands purchased since the making the will?

It was admitted, That if there had been no other lands purchased since the making of the will, where the conveyances had been executed, *there* possibly, rather than this clause should be intirely frustrated, they should pass: And in that case, the vendor would in a Court of Equity, be considered as a trustee for the purchaser; for equity always considers things that ought to be done, in the same light as if they were done. But *here*, there being other lands purchased since the making of the will, where the conveyances have been executed, the words of the codicil being satisfied by those lands, ought not to be extended any further; especially to the disinheriting of an heir at law.

Maxim of equity.

Nay, in case there were no other lands, this rule of equity could be extended no further than to such purchases, where though no conveyances were actually * executed, yet the time fixed by the articles for the execution of them was passed; and then those lands where the time limited for the executing of conveyances was not yet come, will not pass, but descend upon the heir. If the testator had intended

* P. 527.

Michaelmas Term 10 Geo. I.

This point was clearly decreed by the Lord Chancellor in favour of Mr. *Vernon*.

Demise of a shilling to an eldest son in satisfaction of all claims, held sufficient to exclude him from his distributory share of the testator's personal estate.

In the arguing of this point, the case of *Vachel* and *Vachel* was cited by Mr. *Vernon*'s counsel; where, upon a bill brought by the eldest son, to have his distributory share of the personal estate, it was decreed against him upon this single circumstance, That the testator by giving him a shilling in satisfaction of every thing he might claim out of his estate, had manifested his intention to be, that he should have nothing at all.

2d Point, Whether a fee-farm rent should pass in a will by the word *Lands*?

* P. 525. For the plaintiff. There must either be express words in a will, or a necessary implication to disinherit, an heir at law.

2 Vern. 571. 3 Salk. 128. Where a devise of the manor of F. passed a fee-farm rent issuing out of that manor; because otherwise the will must have been void, the testator being seised of nothing else in that manor but the fee-farm rent.

Another point insisted upon by Mr. *Atcherley*'s counsel was, That the fee-farm rent of 35 l. per Annum, issuing out of the manor of *Hanbury*, and purchased in by Mr. *Vernon*, did not pass to the trustees by the word *Lands*.

* It was said, That an heir at law, is never to be disinherited, but by very clear and plain words: That therefore the word *Land*, should never be extended to comprehend fee-farm rents, to the disinherison of an heir at law; unless where the word can relate to nothing else, and so otherwise be totally void. And upon that distinction went the case of *Inchly* and *Robinson*, 2 Leon. 41. and 3 Leon. 165. The deviser being seised of a fee-farm issuing out of the manor of *Fremington*, and of no other land whatsoever, devised his manor of *Fremington* to J. S. And it was there held, That the devise of the manor of *Fremington*, were words in a will, sufficient to pass the fee-farm rent issuing out of that manor; for the deviser being seised of that rent, and nothing else in that manor, it was plain, That the testator meant the rent, and could mean nothing else: So that otherwise the will must have been intirely void.

For the defendant. Merger.

To this it was answered by the counsel for Mr. *Vernon*, That Mr. *Vernon* the testator, being seised in fee of the manor of *Hanbury*, out of which this fee-farm rent did issue; had merged the rent in the inheritance, by taking a purchase of it to himself in fee.

But it was further insisted upon, That such a rent would very well pass by the word *Land*.

The case of *Inchly* and *Robinson* proves, That the word is sufficient to pass it, where the intention of the testator is plain that it should pass; for the word *Land* certainly as comprehensive as the words in that case, viz. the Manors of *Fremington*; nor could the circumstance of the testator's having nothing else to pass, more strongly

Michaelmas Term 10 Geo. I.

strongly shew the intention of the testator, that it should pass in that case, than the release in the present.

Where a man had a portion of tythes in fee; held, That *that* * P. 526. should pass in a will, by the words *all my free Lands*. It is true Where the testator was seized of a portion of tythes in fee, and nothing else; Resolved the testator had in that case nothing else; but that is a circumstance of no weight, any * further than as it serves to shew what the testator intended, which the release directed does abundantly in the present case, *Style 261*.

That that should pass by the words *all my Free Lands*.

The word *Livelibood* will pass land in a will. Fee-farm rent extendible upon an *Elegit*, and yet the words of the statute that gave the sheriff authority are only *Land, medietatem terre*. Land will pass in a will by the word *Livelibood*. Stat. Westm.

2. fee-farm rents extendible upon an *Elegit*.

Lord Chancellor merged in the inheritance, and purchased by the testator with a view that it should be so. Besides, the word *Lands* sufficient to pass it; especially in a will, and where the intention of the testator is so very plain, as here it is, that it should pass.

Another point insisted upon by Mr. *Atcherley*'s counsel was, That the lands contracted for where no conveyance was executed, and especially those lands where the very time fixed by the articles for executing conveyances, was not come at the time of the making the codicil, did not pass by it; and consequently would descend to the heir at law. 3d Point, Whether lands contracted for, but not conveyed, should pass by a devise in a codicil of all the lands purchased since the making the will?

It was admitted, That if there had been no other lands purchased since the making of the will, where the conveyances had been executed, *there* possibly, rather than this clause should be intirely frustrated, they should pass: And in that case, the vendor would in a Court of Equity, be considered as a trustee for the purchaser; for equity always considers things that ought to be done, in the same light as if they were done. But *here*, there being other lands purchased since the making of the will, where the conveyances have been executed, the words of the codicil being satisfied by those lands, ought not to be extended any further; especially to the disinheriting of an heir at law.

Maxim of equity.

Nay, in case there were no other lands, this rule of equity could be extended no further than to such purchases, where though no conveyances were actually * executed, yet the time fixed by the articles for the execution of them was passed; and then those lands where the time limited for the executing of conveyances was not yet come, will not pass, but descend upon the heir. If the testator had intended

Michaelmas Term 10 Geo. I.

intended otherwise, he might have made this very plain, by expressing himself thus, *Lands since purchased or contracted for.*

For the defendant.

In answer to this it was said, That upon all the circumstances of the will and codicil taken together, nothing could appear plainer than that it was the intention of the testator, they should not descend to the heir at law, but pass by the codicil. And if the intention be plain, it cannot be controverted, but that the words made use of by the testator in the codicil, *viz. All the lands purchased by me since the making my will, and my said real estate* are large enough to take them in.

It was admitted by the counsel of the other side, That the words would have passed them, in case there had been no other lands; and Why is that? Only because it would have been then evident the testator had intended them to pass; and here the release ordered by the testator speaks this full as strongly.

As to the difference taken between *where* the time limited for the executing of these conveyances is past, and *where* yet to come; nothing at all in it, for *that* relates only to the terms of the trust reposed by equity in the vendor.

A material circumstance, that in every one of these contracts, part of the purchase-money was paid.

* P. 528.

In case of a contract for the sale of lands, the vendor is deemed in equity a trustee for the vendee till the conveyance is executed: And if the vendor should afterwards sell the same lands to another, having notice of the precedent agreement; the first vendee may in such case, bring his bill against the second vendee for a specific performance.

A known and established rule in equity, That from the time of the contract, the vendor is a trustee for the vendee. Upon this foundation it is, that a bill lies in equity against the vendor for a specific performance: Nay should the vendor afterwards, sell this land to another, having notice of this precedent * contract, equity still transfers the trust; and the second vendee may in such case, be compelled to a specific performance.

These words *contracted for* and *purchased* very commonly used promiscuously.

Besides, if this were not to be considered as real estate, then it must be personal estate, for there is no medium; and if so, it is given to the trustees to be by them invested in land, and settled to the same uses: But if it be to be accounted as real estate, and as such descendible to the heir at law; then it is devisable, and will pass by the words of the codicil.

Affirmed upon a re-hearing by Lord Chancellor Cowper. See Rep. of Cases in Equity 91. Ant. 39.

Cases quoted to this purpose were, *Lingen* and *Souroy* in Lord *Harcourt's* time: A man by his will gave all his land in the county of *York* and kingdom of *England*, and had no lands at the time of his death, but only had obliged himself by marriage articles to purchase lands to the value of 1400*l.* And held that this 1400*l.* should be considered as real estate, and was well passed by the will. In that case

Michaelmas Term 10 Geo. I.

case, the case of *Atkins* and *Atkins*, in Lord *Jeffrey's* time, was quoted.

The case of *Woodier* and *Greenbill*: Freehold land was devised to trustees, the land was contracted for before the will, viz. in April, the will was made in June, time fixed by articles for the conveyance was at *Michaelmas*; yet held Lord *Harcourt*, That the land passed, he being of opinion, That had the testator died before the conveyance, and made no devise of it, the heir might have claimed it as land, and compelled the executor to have paid for it out of the personal estate; and consequently, if the deviser had such an interest in the land contracted for as was descendible, it was devisable. And Mr. *Vernon* the present testator, being of counsel in that case, insisted very much upon the absurdity of supposing it neither real nor personal estate; * for if personal estate it must not descend to the heir, which all held it would; if real estate and consequently descendible, then it was well devised.

2 Vern. 679.
Rep. of Cases
in Equity 77.

* P. 529.

Whatever is
descendible to
the heir at
law as real
estate, is de-
visable as such.

Case of *Prideaux* and *Gibbon*, 2 *Chancery Cases* 144. A man having contracted for an estate, devises all his land to be sold for the payment of his debts; and after the making of the will, the land was actually conveyed to him in pursuance of the antecedent contract: The court decreed the land to be sold for the payment of his debts. And if the testator had power to devise an estate contracted for, before conveyance, for the payment of his debts, he might certainly have devised it in any other manner. Said in that case, by the Lord Chancellor, That where a man devises his land to be sold for payment of his debts, and he afterwards purchases lands, equity will decree a sale, though there were no articles entered into precedent to the will.

If a man de-
vises his land
for the pay-
ment of his
debts, equity
will decree a
sale of the lands purchased after the devise.

Lord Chancellor was of opinion, That all the lands contracted for by the testator, as well as those which had been actually conveyed to him, did pass by the codicil.

Then Mr. *Atcherley's* counsel insisted, That the copyhold land did not pass by the codicil; but held clearly that it did.

Copyhold
lands devisa-
ble without a
surrender, if

the testator has only an equitable and not the legal estate. 2 Vern. 680. See the state of the case Ant.

Then it was insisted upon by Mr. *Atcherley*, That some manu- script Reports of Cases in Chancery, found in the *London* house, did belong to the heir at law, as guardian of the reputation of his ancestor.

Whether
manuscripts
should de-
scend to the
heir at law?

It was said, That if the tomb or monument of an ancestor be defaced or destroyed, and action lies for the heir at law; and that by parity of reason, as those manuscripts were intended by the tes-

tator,

Michaelmas Term 10 Geo. 1.

tator, as a monument to transmit his learning and reputation to posterity; the law would intrust the heir with the care of * them, that they should be printed in such a manner, as would be most for the honour of Mr. *Vernon's* memory.

The printing, or not printing these papers, may as much affect the reputation of Mr. *Vernon*, as any monument or tomb. Possibly, they are not fit to be printed; possibly they were never intended to be printed.

This not in the nature of the thing fructuary; and will not therefore, fall within that clause, that gives the residue of the personal estate to the trustees.

Suppose a man of learning, should have the misfortune to die in debt; Can the creditors come into this court, and pray a discovery of all his papers, that they may be printed for the payment of his debts?

And if creditors cannot do this; *a fortiori* not the trustees in the present case.

If a minister of state should die, he may have a great number of papers, that may be very curious, may print and sell well; yet surely, these will not be considered as personal estate, and go to the executor.

As therefore papers found in a man's study, not being in their nature fructuary, are not considered as personal estate; and in case of no will, would not have gone to the administrators of Mr. *Vernon*; so it was argued that they did not pass under that clause, where the residue of his personal estate is given to the trustees.

Owen 124. Resolved in the earl of *Northumberland's* case, That notwithstanding all his jewells were devised to his Lady; yet his garter, and collar of S S should go the heir.

On the other side, it was strongly insisted upon, That it was personal estate; and was devised to the trustees by those words, *The residue of my personal estate.*

* P. 531. * It was insisted upon in behalf of the widow, That she ought to have them, as included in the devise of household goods and furniture.

The court decided nothing in this affair; because all consented to have them printed under the direction of the court, without, making any profit of them.

Those points being thus determined against Mr. *Atcherley*; Mr. *Vernon's* counsel in virtue of a cross bill brought for that purpose, prayed That the court would decree Mrs. *Atcherly* and her daughter

Michaelmas Term 10 Geo. I.

to release in the most effectual manner, or else to wave their legacies ;
for which the case of *Thorold* and *Thorold* was cited.

This as highly reasonable was directed by the court.

There was another point contested by Mrs. *Vernon* the widow,
which was this.

Sir *Anthony Keck*, Mrs. *Vernon's* father, did by his will, made
in 1695, devise the sum of 200*l.* to his daughter Mrs. *Vernon*, in
these words, viz. *To be by her laid out in what she shall think fit in*
remembrance of me ; he gave also another legacy of 50*l.* to the de-
ceased Mr. *Vernon*, and made him one of his executors.

A legacy of
200*l.* given
to V.'s wife
by her father,
to be laid out
by her in
what she

should think fit in remembrance of him. Decreed she should have the 200*l.* over and above the provision
made for her by her husband's will.

It was said, That taking all those circumstances together, it must
be intended, That the testator did plainly design this, as a legacy to
the separate use of his daughter, though he does not use those very
words ; and therefore as the testator never designed, that this mo-
ney should be sunk in the estate of her husband, the estate of the hus-
band ought to be still liable to this demand, in the hands of the trus-
tees.

And it was accordingly decreed for Mrs. *Vernon*.

* N. B. It is a point of law very well known, That if a man de-
vises all his personal estate, and he dies worth double the personal
estate he had at the time of the making the will, all his personal
estate will pass.

* P. 532.
A devise of all
the personal
estate, will
pass whatso-
ever personal
estate the testator dies possessed of.

But if a man devises all his real estate, no land purchased after the
making of the will shall pass by it.

But by a de-
vise of all the
real estate,
nothing more will pass than what the testator had an interest in at the making his will.

This difference the Lord Chancellor was pleased thus to account
for, That the statute which made lands first deviseable, uses these
words, a man *having Lands* : So that the parliament seemed to con-
sider devise as another instrument of conveyance ; and therefore the
rule has always been, that a man can devise nothing, but what he
might by deed convey.

The reason
of this differ-
ence in
devises of
real and per-
sonal estate
Stat. 32 H. 8.
cap. 1. and
Stat. 34 & 35
H. 8. cap. 5.

Quere of this. For admitting, That a will is to be considered as
a conveyance, yet like other conveyances that are not esteemed valid
until sealed and delivered ; so a will ought not to be reputed as a
will, until the death of the testator, when it takes effect ; and it
might not seem unreasonable to consider a will as wrote every day of
a man's life, that it lies by him unaltered.

Michaelmas Term 10 Geo. I.

2 Vern. 688.

The true reason of this difference, as seems to me, must be taken from the fluctuating nature of personal estate; so that death is the only time when this is capable of being reduced to a certainty; it being next to impossible to discover what the personal estate of the testator amounted to, or consisted in, at the time of making his will.

* P. 533.*

Michaelmas Term

11 Geo. I. *In Cur. Canc.*

S. l. 2. P. 533. 245.

Osgood and Stroud.

Marriage settlement.
How far the consideration extends to all the uses in the settlement.

BY marriage-articles it was covenanted, that land should be settled upon husband for life, wife for life, then to the issue of that marriage in tail, remainder to the fourth son of the husband's father. This fourth son died, leaving behind him a daughter married to the plaintiff, who brings his bill, the estate-tail being spent, and no settlement made, to have the articles performed specifically, by settling, &c. in opposition to the defendant, to whom, as heir at law, it would descend in case of no settlement.

For the defendant.

Ant. 469,
471, 476.

* P. 534.

Argued for the defendant, That tho' these articles were founded upon the consideration of marriage, yet they must be esteemed voluntary for so much of them as that consideration would not reach or cover; and a court of equity will not in favour of volunteers, aid a defective settlement, much less decree one where there is none.

* The plaintiff, who is a remainder man after the limitation to the issue of the marriage, is certainly a volunteer; and then the question is singly, whether the court will interpose so far in favour of a volunteer, as to carry a covenant to settle, into execution, to the prejudice of the heir at law, upon whom it would otherwise descend.

That

Michaelmas Term II Geo. I.

That the court would not, the following cases were cited: The case of *Robinson and Kirsaire*, the case of *Thompson and Lord Haversham* before Lord Cowper, the case of *Bellingham and Loutber*, 1 *Chancery Cases* 243. This last case much relied upon.

For the plaintiff it was said, That trusts, tho' voluntary, must be performed; that they may be created as well by articles as otherwise, and as well by marriage articles as any other way. That *here* there being a covenant to settle, &c. the question was, Whether this not being performed by the ancestor, an implied trust to do this was not devolved upon the heir.

In the case of *Jenkins and Keymis*, reported both in *Hardres* and the *Chancery cases*, expressly affirmed *per* Lord Chief Baron Hale, That the consideration of a marriage-portion, will extend and run through all the uses in that settlement; and what consideration would be good by way of settlement, will be so by way of articles.

Lord Chancellor Macclesfield:

It seems clear to me, That where there is a marriage portion and settlement, that part of the settlement only, which belongs to the wife and children by that wife, can be esteemed to be founded upon the consideration of that marriage; for absurd to imagine, that the friends of the wife should be supposed as at all concerned about the remote uses of the settlement, upon persons to whom they are entire strangers. And as for the case of *Jenkins and Keymis*; it ought * not * to be understood in so absurd a sense, as that comes to. The meaning of the case is no more than this, that a father, when he makes a marriage settlement upon one son, has such a proper, fair, and justifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon and embrace it, by inserting in the settlement provisions for them; such provision shall never be esteemed as fraudulent, and as such set aside in favour of creditors.

Therefore very plain to me, that the plaintiff must be considered as a volunteer, if there was nothing more in the case, than the consideration of the marriage, and the marriage portion.

But upon supposition, that the estate, was neither all in the father, nor all in the son; so that neither could, without the assistance and help of the other, have made this settlement; *then* it may be very natural to suppose, that this part of the settlement, under which the plaintiff claims, might be founded upon an agreement between father and son. For very natural for the father to tell the son, I must provide for my other children, as well as you; and therefore, unless you will consent to this, I will not join with you in making this settlement. And then this remainder-man the plaintiff must not be considered as a volunteer, but as one claiming under the consideration of the father's doing *that*, to enable the son to make the settlement, which he was not bound to.

Michaelmas Term 11 Geo. I.

This I take to be the state of the present case ; for by the evidence it seems to me, that the father had a power of charging the estate, with the payment of 1300 l. which probably he might depart from, upon the consent of his son to that part of the settlement, under which the plaintiff claims.

Upon this reason, without determining the point that related to volunteers, he decreed a settlement to be made upon the plaintiff, pursuant to the articles.

* P. 536.

* Trinity Term

11 Geo. I. *In Cur. Canc.*

Hill versus Filkins & ux.

See the State of the Case, page 481.

WHEN this case was before Lord *Macclesfield*, he was strongly of opinion for the plaintiff, the heir at law ; but in order to bring the matter more fully before him, he made an order directing some issues to be tried ; from which order the defendant appealed to the house of Lords, as having directed issues to be tried, that were not warranted by the pleadings. The house of Lords set the order aside, but gave the plaintiff leave to amend his bill ; which he did. And upon this amended bill, and the pleadings thereupon, the point in law came now to be spoken to again before Lord Chancellor *King viz.* Whether the grand-daughter, the defendant, having conformed by taking &c. according to the act, &c. within six months after attaining the age of eighteen, was capable of taking the residue under this will ; she being about fourteen at the time of the death of the testatrix.

Stat. 11 &
12 W. 3.

I. Trinity Term II Geo. I.

* Lord Chancellor King clearly and strongly decreed in favour of * P. 537.
the defendant, contrary to the opinion of Lord Macclesfield.

This act of parliament makes no difference as to the religion of those from whom the estates come, whether protestants or papists; but regards only the religion, age and circumstance of those to whom they come.

In this case, it must be admitted upon the authority of the case of *Roper and Radcliffe*, 1st, that the *residuum* disposed of by this will is land.

and legacies, to be considered as land.

The residuum of a real estate devised to be sold for payment of debts
Ant. 93, 234.

2dly, Upon the authority of that case, it must likewise be admitted, that the word *devise* is included in the word *purchase*, in the second clause of that act.

Purchase includes devise.
Ant. 90, 95, 234. 242.

And I think the house of Lords were very right in that determination; because otherwise, this clause in the act, would in abundance of cases have been entirely useless.

But it does not from hence follow, That all devises whatsoever, must be included under this word; without excepting even devises, that appear to me to be allowed of by the former clause, or rather the first part of this clause, for the whole is indeed but one clause.

The legislators had two sorts of persons under their view; viz. persons under the age of eighteen, and persons over that age.

As to the former, the legislators looked upon them as too young, to be fixed upon rational grounds, in any religion whatsoever; and therefore laid upon these only a temporary disability, removeable upon conformity.

But for persons above that age, and who might be supposed, fixed and riveted in their religious sentiments, the legislators thought it to no purpose to expect their conversion; and therefore laid a total disability upon them.

* Not to understand the act of parliament in this manner, would be * P. 538.
to make the legislators overturn their plain and apparent intention in the first clause, by the second.

The defendant therefore is plainly capable of taking by devise under this will, being under the age of eighteen, at the time of the death of the testatrix; and having performed those external acts, that were pitched upon by the parliament, as a sufficient proof of her conformity.

Papists conforming at eighteen, capable of taking lands that were devised to 'em under that age.

THE

T H E T A B L E.

A.

Abatement.

1. **I**T is the conclusion, not matter of a plea, that makes it a plea in abatement, or in bar, Page 112, 192
 2. So that should a man plead in form of a plea in abatement, what for the matter of it might have been pleaded in bar, it would be but a plea in abatement, 112
 3. And *vice versa*, a plea in abatement, pleaded in form of a plea in bar, would be a plea in bar, tho' an ill one, *ibid.*
 4. The form of pleading in abatement, 112, 210.
 5. What judgment must be given upon a plea in abatement, 112
 6. Pleas in abatement must go to the whole, 285
- Vol. X. 3 B

7. They should be certain to every intent, Page 208
 8. It is a rule as to pleas in abatement, That the defendant shall not set aside the writ of the plaintiff, without shewing him a better, 208
 9. Where it appears from the matter of the writ itself, that it ought to abate; there the court is bound *ex officio* to give judgment against the plaintiff, tho' the defendant should not plead it in abatement, 169, 170
 10. Whether writ of error in the exchequer-chamber, may be pleaded in abatement to debt on a judgment upon record in *B. R.*? 17
 11. Covenant not to sue husband and wife, upon a bond entered into by the wife *dum sola*, during the life of the husband, must be pleaded in abatement, and not in bar, 162
 12. If the plaintiff be a feme-covert at the time of the action brought, this is pleadable in abatement, 166
- Acci-

Accident.

Accident one great branch of the jurisdiction of the Court of Chancery,
Page 1, 470

Account.

1. After judgment *quod computet*, no plea can be pleaded before auditors, that would have been a good bar of the action, 22
2. In action of account against one as bailiff, the defendant shall have allowances made him upon the account, 23
3. But it is otherwise in the case of a receiver, who is no bailiff, unless it appears from the nature of the account, that the receiver must have been put to trouble and expence, 23

Act of the Court.

1. Act of court, ought not to prejudice suitors, 30
2. If an act be done by the court that is an error; yet the party in whose favour it was, shall not be admitted to object to it, 381

Act of the Party.

1. What acts personal, and what not, 289 &c. 469 &c.
2. No one shall be allowed to take advantage of his own wrong doing, 101, 250, 343, 379
3. If the execution of a power be prevented by any act of the party concerned in interest to hinder it, this is a sufficient ground for a court of equity to interpose, 473

Actions in general.

1. Every cause must begin either by writ or bill, Page 211
2. The law abhors multiplying of actions, 173
3. Yet a man cannot join his own right and another's in the same action, 171, 172
4. In form'd actions, the plaintiff not at liberty to vary from that set form of words that is prescribed by the law, 140
5. Yet personal actions are not tied up so strictly to the form in the Register, as real actions, 141
6. In transitory actions time and place not material, 251
7. Where the action is grounded upon a statute that gives a certain sum for the penalty, no demand can be of a lesser sum,
8. An action will lie upon a deed dated in foreign parts, 255
9. No action will lie for interest of money, or for money won at play, without an express promise, 312
10. Yet where there is only *mudum pactum*, a promise without any consideration, this is no foundation at law for an action, 295

Action on the Case.

1. A possessory right only, tho' the property be in another, sufficient to maintain an action on the case, 25
2. Therefore, if the general plea of Not guilty be pleaded to an action on the case for taking the plaintiff's goods, it will not be sufficient for the defendant to shew the plaintiff had no property in 'em, except he had no possession of 'em neither, *ibid.*
3. Case

3. Case will lie in damages for a false return in the matter of an election to an office. Page 54

4. In case for maliciously causing the plaintiff to be arrested for 100 l. declaration adjudged to be naught upon a special demurrer, for want of shewing what became of the action, 145, 209

5. But this defect in the declaration might have been cured by a verdict, 145, 210

6. Or by a plea in bar admitting the first action to be false and hopeless, 210

7. Case will not lie for a malicious indictment, without shewing what became of that indictment, 145, 210, 219

8. Court inclined to think, that where the indictment was insufficient, and the matter not scandalous, this action would not lie, 149

9. But afterwards resolved, upon full consideration, that this action will lie for damage by expence, as well as by scandal, tho' the indictment was insufficient, 217

10. Action on the case for an indictment for using the trade of a badger without a licence. Exception taken by the court, that the plaintiff did not shew he was licensed, 148

11. But afterwards exercising the trade *legitimo modo* held sufficient, 215

12. Case for a false and malicious indictment without saying the indictment was *absque probabili causa*, and held good, 148, 214

13. Otherwise if the action had been brought for a malicious prosecution, 148

Action popular.

An action *qui tam* may conclude *et inde producit sectam*, and shall not a-

bate for want of those words *tam pro domino rege quam pro seipso*, Page 253

Additions.

The different additions of *Miles* or *Dominus* in records and legal proceedings, make different names, and must be understood of different persons, 284

Administration and Administrator.

1. Administration by the statute-law, must be granted by the ordinary, 21

2. But the administrator, when put in by the ordinary, derives his power not from the ordinary, but the law, 21, 22

3. Where the goods of the intestate are taken away from an administrator, he may not sue for them in the spiritual court, 21

4. But may bring his action of trover for them at the common law, *ibid.*

5. An administrator shall not be allowed to plead double, *viz. Plene administravit* and *No assets*, without affidavit that he has no assets, 335

6. Administrators pay no costs in writs of error, tho' the judgment be *de bonis propriis*, 276, 277

7. Whether such a right of administering as would entitle to a settlement within the stat. of Car. 2. shall be deemed a settlement before administration actually taken out? 389

Admiralty.

1. Where the property of goods taken by the enemy is altered, and where not,

not, according to the laws of this court, *Page 79*

See property.

2. No suing for fees in the court of admiralty, 264

Affidavits.

1. Generally true, that men must not be compelled to make affidavits, 332
2. Yet when persons are witnesses to an arbitration bond, they may be compelled by rule of court to make affidavit of their being so, 332, 333

Age.

Papists conforming at eighteen are capable of taking whatever lands were devised to 'em before they came to that age, *per Lord Chancellor King; contra Lord Chancellor Macclesfield, 485 &c. 537, 538*

Agreement.

1. By the law of nature, all useless agreements void, according to *Pufendorf, 135, 137*
2. *A fortiori* all oppressive ones, 137
3. Of agreements for the restraint of trade, 27, 85, 130
See trade.
4. Whether an agreement not to sow one's land, be void or not? 135
See law cases doubted or denied.
5. An agreement that is void at law, shall never be carried into execution by equity in favour of a third person, contrary to the meaning of the parties to the agreement, 459
6. If by the agreement of parties, two acts are to be done, and a certain time is limited for the doing of one,

and no time for the other; *there, if the nature of the thing will bear it, that thing is to be done first, for which the time was limited, Page 224*

Aldermen.

1. Whether the right of voting for an alderman of *London*, lies only in the freemen of the ward; or in all the inhabitants that pay scot and lot? 199
2. When other persons are returned to the court of Aldermen of *London*, than what were chosen for that office by the wardmote, the proper remedy of the parties grieved is to make their complaint to that court, 59
3. For that court are the proper judges of the goodness of such returns, 61, 62

Aliens.

1. An alien can't purchase lands for his own benefit; but he may for that of the crown, 91, 94, 120, 122, 136
2. Therefore if land be devised to an alien, the crown shall have it, 94
3. Yet if alien tenant in tail suffers a common recovery before office found the recovery is good, 124
4. Where an alien should take by course of descent, there the estate shall go over to him, to whom it would have gone in case the alien had been already dead, 116
5. As where tenant in tail has issue two sons, and the eldest is an alien, the younger brother shall inherit, *ibid.*

6. Yet

A

6. Yet if an alien be tenant in tail, remainder to a subject, the remainder man can't come in 'till the estate-tail be spent, Page 120

Almanacks.

1. To be licensed by the archbishop of *Canterbury* and bishop of *London*, 105
2. Whether the crown has any special interest in almanacks? 107
3. Whether an almanack may be considered as a copy or part of the kalendar in the book of common prayer? 105, 106
4. Almanacks of authority in trials, 107

Ambassadors.

1. An ambassador does by fiction of law, represent the person of his master, 5
2. The same fiction of law makes him extraparochial, and *quasi* in the dominions of his master, *ibid.*
3. *Coke* upon stat. 25 *Ed.* 3. affirms it to be high treason at the common law to kill an ambassador, *ibid.*
4. If he commits any crime (tho' it should be one of a very high nature) the king *a quo, non ad quem* must punish him, 4
5. His person is not liable to be arrested for debt, *ibid.*
6. Nor are his goods liable to distress, *ibid.*
7. The privileges of ambassadors, as to debt, settled by stat. 7 *Ann. c.* 12. 5

Amendment.

1. Statutes of amendment extend only to pleadings of record, 88
2. Pleadings while in paper are amendable by common law, 88
3. And the motion to amend, because all in paper, is what the court (commonly) can't deny, *ibid.*

VOL. X.

A

4. Except where the party moving refuses to pay costs, Page 88
5. Or where the amendment moved for would amount to a new plea, *ibid.*

Amicus Curiae.

Where any one may inform the court, 41

Ancient Demesne.

A plea of ancient demesne received after imparlance, 129

Annuity.

1. The only personal interest which is descendible to the heir, 237
2. Where testator charges his lands with annuities in favour of papists, the devise is void, 512, 514

Answer in Chancery.

Where the whole proof of any matter arises from the defendant's answer, the answer must be taken entire, and no part of it impeached by any other evidence, 495

Appeal.

1. In an appeal of murder, exception taken to the writ for an insensible abbreviation, 86
2. The words *de morte sui viri unde eum appellat* being omitted in the exigent, Whether this make a discontinuance? 86, 87

Appearance.

1. Where persons may be convicted upon summons without appearance, 248, &c. 341, &c. 344, 378
2. Members of corporations may be disfranchised after summons without appearance, 343, 380
3. Appearance will supply the want of summons, 214

5 C

4. Where

4. Where and when judgment may, or may not be given in the absence of the offender, *Page* 250, 344, 378, &c.
5. Execution cannot be awarded otherwise than in the presence of the party, and why, 344

Apprentice.

1. An agreement with an apprentice not to exercise the trade within such a distance of his master, good, 138
2. If an apprentice makes use of the goods or cash which belongs to his master, he forfeits his indentures, 144, 145

Appropriation.

1. The appropriation of a church takes away the bishop's power of depriving, 68
2. But not *that* of visiting and suspending, 68, 69

Arbitrament and Arbitrators.

1. Though it be ordered by the testator, That whatever controversies arise upon the construction of his will, shall be decided by such and such arbitrators; yet the parties concerned may notwithstanding decide them at law, if they think fit, 59
2. An award may be good in part, and void in part, 200, 204
3. As an award to make general releases of all demands to the time of the award, is good for so much as goes to the time of the submission, and void for the residue, 200
4. Therefore if releases of all demands be given to the time of the submission, it is a good performance of such an award, 201
5. An award that the defendant should pay the plaintiff so much, and each of them such a sum to the arbitra-

tors; and that upon payment *prædict' monet'* the parties should give mutual releases. Exception, That the defendant had no remedy to come at the release, since the plaintiff was not bound to give it, till after the sum paid the arbitrators, which part of the award was void. Resolved That *monet' præd'* should refer only to that sum, which concerned the justice of the award, *Page* 200, 201

6. But if any part of the award be void which concerns the justice of the award, the whole is void, 204
7. An award made the 23d of June, ordering so much money to be paid by *A.* to *B.* in satisfaction of rent owing to *B.* which rent did not become due till the 24th of June, void; for the rent might be extinct either by surrender, or eviction, before it became due, 204
8. Prosecution of a suit by *A.* against *B.* and *C.* no breach of an award That all suits should cease between *A.* and *B.*, 205
9. Law the same though *B.* and *C.* had been man and wife, 205
10. On breach of an award made a rule of court, the party may proceed both by action and attachment at the same time, 333

Archdeacon.

1. An action will lie against an archdeacon for not inducting a clerk, 53
 2. And for refusing to swear in persons chosen church-wardens, 53, 55
 3. But no action will lie against an archdeacon for swearing in a wrong person church-warden, if it be done in obedience to a *Mandamus*, *ibid.*
- Arrest

Arrest of the Body.

1. What persons are privileged from arrests for debt, *Page* 4, 111, 346, 347
2. No action will lie for a malicious arrest, without shewing how the suit was determined, 145, 209

Arrest of Judgment.

1. If general damages be given where by law none can be given for part, judgment shall be arrested, 273
2. As where joint damages are given for words actionable, and for other words spoken at a different time not actionable, judgment must be arrested, 197
3. If it manifestly appears upon the face of the declaration, That no evidence could maintain the issue, judgment must be arrested after verdict, 313
4. Judgment arrested because it appeared upon the declaration, That the cause of action did accrue by a promise in writing, above six years before action brought, 311, &c.
5. *Otherwise* if the declaration had been upon a parol promise, 253, 313
6. In *Assumpsit* brought by executor on promise to testator, judgment arrested; because it appeared upon the declaration, That the testator was dead above six years before the action, 314
7. Debt upon note, I acknowledge my self indebted to A. so much, which I promise to pay upon demand. Moved in arrest of judgment, That a demand ought to have been alledged, being part of the agreement; but held unnecessary, because the debt here did not arise from the demand, as from the performance of a precedent condition, but was a debt precedent to the demand, 38

Assets.

1. If the executor of lessee for years enters upon the testator's term, no part of the profits but what is above rent and repairs is assets, *Page* 12
2. In *Assumpsit* upon promise made by the executor in consideration of forbearance, assets will be supposed; for unless he had assets, there was no occasion for the promise, 254
3. No difference *commonly* between assets at law, and assets in equity; but both must be distributed in a course of administration, 427
4. Yet where land is devised to be sold for the payment of debts, the profits arising from the sale shall be applied to the payment of all debts equally; and why, 428
5. If a creditor by simple contract obtains a judgment against an executor, he shall have no preference before the rest of the creditors with respect to equitable assets; because the judgment might be voluntarily confessed, and equity will not assist an executor to overturn the course of administration, 426, &c.
6. But one that is a judgment creditor at the time of the testator's death, shall have the same preference with respect to assets in equity as to assets at law, 428
7. Where a man dies indebted by specialties and by simple contract, and does not leave personal estate sufficient to pay both; equity will oblige the creditors by specialty to receive their debts out of the real estate, that the creditors by simple contract may not be defrauded, 462, 489
8. But this power of marshalling assets, is never exercised in favour of any residuary legatee, and to the prejudice of the heir at law, 477
9. *E.*

9. E. makes a settlement upon his wife after marriage in bar of dower and thirds, of lands that were then his father's (his father joining with him) and not to take effect till after his father's death. And afterwards he devises his lands to be sold for the payment of his debts, and dies living his father. The wife waves this settlement, and insists upon dower. But the Lord Chancellor finding, That if the lands comprised in the settlement were to descend immediately upon the heir at law, there would not be assets sufficient to discharge the testator's debts, decreed the wife should take those lands for life (the father being dead at the hearing of the cause), but that she should assign them over in trust for the creditors, who should convey to her a third of her husband's land for dower, *Page 487, &c.*

Assignment, Assignor, Assignee.

1. Where and how far choses in action have been held assignable, 164, 245, 289
2. Assignment of a bond good only in equity, 102
3. So that if after the assignment of a bond, the assignor gives a warrant of attorney to acknowledge satisfaction upon record, this relievable only in equity, 102
4. Of the assignment of bail-bonds by sheriffs, 190
5. Assignee how to declare upon a bail-bond, 190, 191
6. If a judgment be assigned, it will vest in the assignee before acceptance, 189, 190
7. But if the assignment want a good consideration, it will be maintenance; and consequently void, 223
8. Of the assignees of bankruptcy, See *Bankrupts* 9, 10.

1. What the judgment is upon a writ of assise, *Page 125*
 2. Would lie against a monk, *ibid.*

Assumpsit.

1. An *Assumpsit* will not lie upon a *nudum pactum*, or a naked promise without any consideration, 294, 295
2. Yet a very small consideration has been held sufficient to support this sort of action, 296
3. Whether the consideration of the promise, or the cause of the debt need be particularly set forth? 295
4. What need not to be averred in the declaration upon an *Indebitatus Assumpsit*, but shall be supplied by a necessary intendment, 331
5. Whether church-wardens who received money by mistake for the use of the parish, may be sued upon an *Assumpsit* after they have paid this money over to the parish, and their year of office is expired? 23
6. If a wager be won, an *Indebitatus Assumpsit* lies against the person that held stakes, for money received to the plaintiff's use, though the winning of the wager was not proved before the action brought, 315
7. *Assumpsit* for goods sold and delivered. Defendant pleads in bar, That before the action he made a tender of the money, and that ever since the tender he was ready to pay it. Bar held insufficient; for the plea ought to have been, That he was ready to pay the money from the delivery of the goods, i. e. from the time when it became due, 81
8. *Assumpsit* upon a parol promise, and after the statute of limitations pleaded, the plaintiff varies the time in his

A

his replication from *that* in the declaration. Held that no advantage can be taken of *this* upon a general demurrer, Page 251, 341

9. Whether in an *Assumpsit* upon a promise *certain*, the jury have power to assess the damages as they see cause? 29, 30, 86
10. Where an *Assumpsit* is brought upon a promise made by the executor, though for a debt of the testator's, the judgment is always *de bonis propriis*, 254

Attainder.

1. The estate of a person attainted for treason is forfeited to the king, 359
2. But in an attainder of felony, the offender's lands are forfeited to the Lords of whom they are held, *ibid.*
3. In both cases the blood is corrupted, *ibid.*
4. Persons attainted for treason, have a capacity left in them of taking lands by purchase; though not for their own benefit, but *that* of the crown, 122, 359
5. Yet if one that is attainted suffers a common recovery before office found, the recovery is good, 124
6. By the common law persons attainted incapable of taking lands by descent, 116, 120, 359, 361, 415

Attorney and Solicitor

1. An attorney compellable, according to Lord Coke, to serve in his employment, 263
 2. Not to be examined concerning the secrets of his client's cause, 41
 3. Yet it was resolved That an attorney should be examined concerning the time of the execution of a deed, being *what* he might come to the knowledge of without his client's information, 41
- Vol. X.

A

4. Judgment confessed by warrant of attorney after the death of the defendant, can be awarded by error only, Page 45

Averment.

Where an averment is necessary, and where not, 149, 191, 254, 295, 330, 331

B.

Bail in Civil Cases.

1. When a debt is ten pounds or upwards, special bail is required by course of the court, otherwise not, 24
2. And yet sometimes in extraordinary cases, the court will hold to bail where a bond is conditioned for payment of less than ten pounds; because the legal debt amounts to more, 24
3. Never allowed in debt upon judgment in *B. R.* pending error in the Exchequer Chamber, 17
4. Who are privileged from being held to special bail, see Arrest of the Body, 4, 111
5. Anciently the bail to one action, was to stand bail to all actions, that the party should be charged with when in court, 153
6. This is now altered by rule of court in case of special bail, *ibid.*
7. But as to common bail the law still the same, 153
8. Though the bail be never so much grieved by the judgment against his principal, yet he can bring no writ of error to reverse it, 44
9. Bail in *B. R.* not liable to costs assessed upon error in the Exchequer Chamber, 270
10. Held That special bail should not be put in by plaintiff in error of judg-

judgment upon a bond, conditioned for the payment of such a sum, in case he the obligor failed to discharge a debt, for which the obligee stood his surety, Page 281, &c.

11. So where the condition of the bond is to save harmless, 282

12. Law the same in error on debt upon an award, *ibid.*

13. Sheriffs obliged to bail the persons they arrest, 288

14. Assignment of bail-bonds to the plaintiff a common practice before the statute, 289

15. And though such assignments were not good in strictness of law, yet they have been taken notice of by the courts, and not suffered to be evaded, *ibid.*

16. But since the statute, the sheriff cannot refuse to assign them, *ibid.*

17. Whether the circumstances required by the statute to be observed in assigning, make it necessary to be done by the sheriff in person? 289, 291

18. Whether in case of the sheriff's death, a bail-bond may be assigned by his executor? *ibid.*

19. Or whether the plaintiff must not in such case be obliged to sue in the sheriff's name, as before the statute? 291

20. Whether bail-bonds may be assigned by the under-sheriff? 288

21. And if they may, whether his assignment is good after his year of office is expired? 290

22. Difference taken as to the declaration upon a bail-bond, where the action is brought by the sheriff, and where by the assignee, 191

23. Bail cannot plead to a *Scire facias* on his recognizance, death of the principal, generally, without confining it to some time, 306

24. Neither may he plead death of the principal *ante emanationem Brevis*;

because no material issue can be joined upon it, Page 267, &c. 303, &c.

25. But death of the principal before the return of the *Capias* is a good plea, 269

26. Precedents wherein the pleadings is, death of the principal before the issuing of the *Capias*, of no authority; because it was formerly controverted whether the bail was not liable even before the *issuing*, whereas it is now settled, That he has time for rendering the principal until the *Return*, *ibid.*

27. Yet Judge *Pratt* doubted upon a second argument, whether if death of the principal *ante emanationem Brevis* be pleaded, (it being a plea of excuse) the bail shall not be obliged to stand or fall by it, and that the court will intend he did not die between the issuing and the return of the writ, 306

28. Variance between the *Scire facias* and the recognizance of bail cannot be assigned for error, if over of the recognizance was not demanded below; because in such case the recognizance is no part of the record before the court, 444

Bail in Criminal Cases.

1. Persons committed for treason bailable in *B. R.* by the ordinary power of that court, independent of the *Habeas corpus* act, 334

2. And where there have been particular reasons to induce the court to the exercise of that power, persons so committed have been bailed during the suspension of that act, *ibid.*

Bailiff.

1. Difference taken between bailiffs and receivers, 23

2. If

2. If a bailiff enters an house with a writ of execution, any person may justify assisting him, even without his command, *Page 25*

Bankrupts.

1. The commissioners of bankruptcy put by the statute into the place of the bankrupt, as to the management of his estate, *244*

2. And the assignees have the same remedy to recover the bankrupt's debts, that the bankrupt himself had, *244, 246*

3. Debts owing to the wife before coverture, assignable upon the bankruptcy of the husband, *164, 244, &c.*

4. And, *vice versa*, a creditor of the wife's before coverture, is a creditor of the husband's within the statute of bankruptcy, and shall be let in for an equal proportion of the bankrupt's estate with the rest of the creditors, *247*

5. Consequently debts owing by the wife before coverture are all discharged by the bankruptcy of the husband, *160, &c. 243, &c.*

6. And that for ever, though the wife should survive the husband, *247*

7. Yet where a woman puts her estate, precedent to her marriage, into trustees hands, for her separate maintenance, her debts shall not be discharged by the bankruptcy of her husband, *ibid.*

8. But such settlement or conveyance, *quoad* the creditors, shall be deemed void and fraudulent, *ibid.*

9. The assignees of bankruptcy shall not be preferred before a mortgagee or purchaser precedent, though by defective conveyance, *492*

10. A deed of trust made by a mother, for securing just debts owing to children, at a time she had fears of becoming bankrupt, tho' two months before she actually was so, decreed to be good against the assignees of bankruptcy, *Page 489, &c.*

11. What deeds shall be esteemed fraudulent, so as to amount to an act of bankruptcy within stat. 1 Jac. 1. c. 15. and what not, *493, &c.*

12. *A.* sends up out of the country to *B.* a quantity of goods; *B.* apprehensive he should soon be a bankrupt, delivers a quantity of goods, (mostly the same) to *C.* for the use of *A.* but before *A.*'s acceptance becomes bankrupt. Resolved by the Judges of *B. R.* That the property of the goods was so vested in *A.* even before his acceptance, by the delivery of them to *C.* for his use, that they were not subject to the disposal of the commissioners of bankruptcy, *432*

Bar.

1. How pleas in bar must conclude, *112, 160, 192, 211, 243, 247, 248, 323, 324*

2. Pleas in bar may be supported by common intendment, *330*

3. Where the bar is insufficient, and yet it appears upon the whole record, That there is no cause of action, Whether the plaintiff shall have judgment? *206*

4. Where the defendant's plea in bar, may cure the plaintiff's defective declaration, *210*

5. If two actions are brought in different courts upon the same promise, though for different sums, one action may be pleaded in bar of the other, *285, 286*

6. In

6. In debt upon a judgment in *B. R.* writ of error pending in the Exchequer-Chamber, no plea in bar, *Page 17*
7. *Solvit ante diem* cannot be pleaded in bar to debt upon bond, because no material issue can be joined upon it, 147, 267, 269, 304
8. Yet accord with satisfaction before the day may be pleaded, because this being pleaded by way of excuse, *that* supposes non-performance, and the defendant shall be obliged to prove his plea, 304

Bargain.

1. Whether extravagant and unreasonable bargains shall be carried into execution in a Court of Equity? 503
2. Bargain for the purchase of lands upon condition the vendor makes such a title as the vendee's counsel shall approve of, and the vendee's counsel disapprove without reason, bargain good notwithstanding, 505

Bargain and Sale.

By the common law nothing passed by deed of bargain and sale but the use, and remedy was only in Chancery; but now statute law has passed the estate to the use, 47

Baron and Feme.

1. Husband and wife are to many purposes in law considered as one person, 205
2. By the law of *England* the wife shall share in the honours and advantages, but not in the *Pænis & Criminibus* of her husband, 162
3. Where a feme-covert is punishable for crimes committed with her husband, and where not, 63

4. The law upon marriage considers the debts owing by the wife as the debts of the husband, *Page 163*
5. So that a feme-covert may not be taken in execution for debts contracted before coverture, but the husband, *ibid.*
6. But if the wife dies, the husband does not continue liable to the debts she contracted *dum sola*, 161, 163, 164
7. Neither, if the husband die, is his executor chargeable with them, *ibid.*
8. A debt of the husband's and a debt contracted by the wife *dum sola*, cannot be joined in one action brought against the husband and wife, *ibid.*
9. An action brought against husband and wife for a debt owing by the wife before coverture, must be in the *debet & detinet*, 163
10. The husband may assign a debt due to his wife, 245
11. If a note be payable to a feme-sole or order, and she afterwards marries, her husband is the proper person to indorse this note, 246
12. The husband may release a debt owing to the wife before coverture, 163
13. In what manner the release must be given, 165
14. Yet a bond made to the wife *dum sola*, will remain or survive to the wife, 163, 165, 246
15. But if judgment be obtained during coverture, it shall go to the husband's executors, 162
16. In like manner, the husband may release his wife's share of an intestate's estate, 63
17. And yet, if it be not released, it is so much hers that she shall have it by survivorship, 64

18. Upon

18. Upon the outlawry of the husband, the practice is to seise all the debts owing to the wife, Page 245

19. Though a bond given to a feme-sole is not forfeited by the outlawry of the husband, 2, 165

20. If a husband seised in right of his wife had aliened by fine, it was a discontinuance at the common law, 245

21. The husband cannot sue alone upon a bond given to the wife *dum sola*, 162

22. In what cases a feme-covert may sue or be sued alone in the Spiritual Court, 64

23. The reason of the difference between the common and the civil law in this respect, is, That in the Spiritual Court the husband, though not named, may come in and plead *pro interesse suo*, should the wife desert the cause, 264

24. By custom of London, a feme-covert that is a separate trader, may sue and be sued as a feme-sole, 6

25. The wife may continue her husband's trade after his death, in case she has lived with him seven years, 70

26. Where a woman has power by her first husband's will to sell his land, and marries again before she has executed this power, she may nevertheless not only sell the land, but even sell it to her second husband, if she sees fit, 33

Bastard.

1. Motion to quash an order of bastardy upon divers exceptions, 271

2. In case of bastards, complaint not necessary to the giving justices of the peace jurisdiction, as it is in the case of poor, 85

3. Nor is the parish confined to any time for complaint, 271

VOL. X.

4. Order of justices for the maintenance of a bastard need not set forth, That it is likely to become chargeable to the parish; for no body being bound to provide for bastard children, the law presumes they will become chargeable, Page 84

5. Order for the reputed father to pay so much *per* week for the maintenance of a bastard till it be eight years old, adjudged good. *Sed quære*, 85

Bills in Equity.

If the defendant stands out all contempts till order made for sequestration, the plaintiff may move to have his bill taken *pro confesso*, though the sequestration be not sealed or executed, 431, 432

Bills of Exchange.

1. It is essential to a bill of exchange to be negotiable, 294

2. A bill drawn upon B. requiring him to pay C. seven pounds every month, out of the growing subsistence of the drawer, adjudged to be no bill of exchange, 294, 316

3. Not the same strictness required in penning of bills, current between merchant and merchant, as in deeds, wills, &c. 287

4. No difference between payable to the order of A. and to A. or order; but A. may maintain his action upon acceptance, in the one case as well as the other, 286

5. Acceptance of a bill is payment, and may be pleaded as such, in bar of an action of account, 37

6. Where the drawee first accepts, and then protests a bill, he shall pay interest from the time of the protest, *ibid.*

7. If a bill be accepted, and afterwards indorsed to the drawer, he may

5 E

main-

maintain an action as indorsee, in case he had effects enough in the drawee's hands to answer the said bill, *Page 37*

8. *Otherwise* where the acceptance of the bill is only in honour of the drawer, *ibid.*

9. One draws a note upon a goldsmith, and sends his servant to receive the money, and invest it in Exchequer notes; the servant gets *B.* to give him money for the note, and, then brings the Exchequer bills to his master, and two days afterwards the goldsmith fails. Adjudged that the Master must answer the money to *B.* for the property of the note was not transferred and vested in *B.* but was only in nature of a *depositum* or security to him, so that he could not have sued upon the bill, there being no indorsement, *109, &c.*

Bishop.

If a bishop seized in right of his church, had aliened by fine, it was a discontinuance at the common law, *245*

Bona notabilia.

The spiritual and common law the same to *Bona notabilia*, *272*

Breach in Covenant, Debt, &c.

1. A general rule, That a breach is well assigned in the words of the condition, *443*

2. Therefore where a *Scire facias* on recognizance of bail assigned for breach, That he did not render himself in execution of the judgment, though these were improper words (since the principal only could render himself in execution of the judgment) yet, because they were the very words of the condition, it was held upon error, That the breach

was well assigned, and that the words should be understood in the same sense in the pleading, as when used in the condition of the recognizance, *Page 443, 444*

3. In debt on bond to perform covenants, the breach assigned in the replication, must be certain and single; but *contra* in action of covenant, *227*

4. Covenant by lessee to lime and dung the land *durante Termino*. The heir assigns for breach, That after the descent of the land, he did not, *durante Termino*, lime and dung the land. But the court held this to be no breach; because the land might be limed and dunged so sufficiently before the descent, as not to need it afterwards, *158, 159*

5. Covenant to defend and warrant goods sold to the plaintiff *contra omnes Personas*. Breach, That at the time of the sale, the defendant had neither the possession nor the property of the goods, well assigned, *142*

6. Debt upon bond conditioned to perform covenants comprised in such an indenture, by which the defendant had bound himself to serve the *East-India* company as their factor, and to account for such of their goods as should come to his hands, on the produce of them. Breach, That so many rupees belonging to the company came to his hands, which *illicite & fraudulenter imbezilavit, & in proprium usum, &c.* Resolved upon demurrer, That this was no breach of the condition of the bond; because a factor has power to use the stock of his principal, and to answer it out of his own, *144*

7. Debt upon bond, conditioned, That if *A.* being an apprentice, should purloin or imbezil any thing to his master's damage, &c. Breach, That he

he did purloin and imbezil 200 l. well assigned, though not averred to be to the master's damage, for purloining and imbeziling do import damage, Page 149

Burgess.

1. The office of burgess, or alderman, a publick office that concerns the administration of justice, 108
2. Yet non-attendance at the sessions held to be no good cause of removal, *ibid.*

By-Laws.

1. No by-laws that are unjust or unreasonable can ever be good, 133
2. By-laws to exclude foreigners from the exercise of trade are void, unless made in affirmance of a custom, 131, 135
3. And so are all by-laws intended to hinder trade, 131
4. But by-laws to regulate trade, good; whether they be for the advantage of the town, or of trade, *ibid.*
5. Whether the by-law in the city of London, That none but free-porters shall intermeddle with the unloading goods, &c. under the penalty of 20 s. be valid, or not? 338, &c.
6. A by-law restraining the number of carts in the streets of London, has been adjudged good, 339

C.

Capias.

A *Capias* lies for trespass at common law, 331

Certiorari.

1. If an indictment be removed by *Certiorari* from the sessions into B. R. and the defendant is convicted, the

prosecutor is entitled to his costs by the statute, Page 193

2. A *Certiorari* to remove an indictment against A. will not remove one against A. and B. 205
3. The same law as to orders, 205
4. No *Certiorari* ever granted to judges of oyer and terminer to remove a recognizance for appearance, 278

Challenge.

1. Of suggestions upon record in the nature of challenges, 199
2. Though a challenge be *in esse* at the time of making a former, yet if the party had not by reasonable intendment, notice of the cause of challenge, he is not estopped, 200
3. Where there are two sheriffs and only one is challenged, the *Venire* shall be directed to the other, 199
4. But if both be challenged the *Venire* shall go to the coroner, *ibid.*
5. Upon an information against D. for exercising the office of alderman in London, the crown challenged the array by exception to one of the sheriffs; afterwards the defendant challenging the array by exception to the other, and the *Venire* being directed to the coroner, King's counsel entered a suggestion upon record, setting forth why it was impossible for an impartial jury to come out of London, and therefore pray a *Venire* to the sheriff of Surry, 198, &c.

Chancery.

1. Jurisdiction of the Court of Chancery is generally divided into fraud, trust and accident, I
2. Trusts so intirely under the jurisdiction of Chancery, that the courts of

of law can take no notice of them,

Page 103

3. Chancery may not over-rule the maxims of common law, 1
4. Never gave relief in the case of a collateral warranty, 3, 4
5. Never saves from the penalty of a bond, before full satisfaction made to the obligee, both in respect to principal, interest and costs, 2
6. Will not hinder a man from trying his right by ejectment as often as he pleases, 1, &c.
7. Though the Court of Chancery never directs more than two trials by ejectment, without some special cause be shewn, 3
8. When issue is joined in Chancery, that court awards the *Venire* returnable into B. R. 259
9. In case of an issue directed out of Chancery on a *Scire facias* brought for repealing a patent, the record shall not be remitted after trial into Chancery, but judgment shall be given in B. R. 206
10. Writ *de Excommunicato capiendo* issues out of Chancery, returnable in B. R. 351
11. The Court of Chancery have nothing more to do with this writ after once it is issued; so that the King's Bench and not the Chancery must be applied to for a *Superfedeas*, *ibid.*
12. Pets in Chancery may be recovered at common law, 264

Charters.

1. Conuance of pleas may be granted by charter, but not to proceed by any other law than the common law, unless the charter be confirmed by act of parliament, 125, 126, 129
2. Of the construction of charters, 1
74, &c.

Church and Church-Rate.

1. Parishioners taxable for building a gallery, Page 13
2. An ancient church-rate may be continued as long as the parish pleases, till it becomes unequal, *ibid.*

Church-Wardens.

1. Prescription whether the whole parish or a select vestry shall choose church-wardens, is a matter triable at common law by a jury, 12
2. Church-wardens shall be allowed the expences they are put to in collecting parish money, out of what they receive; and surplussage in case their expences out-balance, &c. 23
3. For they are not to be considered as bare receivers, but as bailiffs, *ibid.*
4. Church-wardens receive money for the use of the parish, where none is due, and upon discovery of their mistake repay the money. Whether in an action of account brought against them by their successors, they shall be allowed to plead this before auditors after judgment *quod computent*; or whether they ought to have pleaded this matter specially in bar of the action? 22, 23

Civil Law.

1. When the property of goods taken by the enemy is altered; and when not, by the civil law, 78, &c.

Commissioners of Hackney Coaches

Usual with these commissioners to convict upon summons without appearance, 344

Com.

Commissioners of Sewers.

1. Order of commissioners of sewers quashed, as exceeding their power, *Page 159*
2. What their power is, *ibid.*

Commitment.

1. A commitment for treason generally, without expressing the species of treason, good, *234*
2. Persons committed by rule of court, not intitled to the benefit of the *Habeas corpus act*, *per Eyre and Fortescue, contra Pratt, 429*

Common Council Ban.

1. Is an office that is in law accounted a freehold, *380*
2. And yet a man may be removed from it in his absence, *ibid.*

Common Pleas Court.

1. The proper court to try the validity of a fine, *44*
2. Fifteen days required in this court between the teste and the return of a writ of inquiry, *383*
3. Otherwise in *B. R.* *ibid.*

Common Prayer Book.

Before the reformation there were almost as many common-prayer books as dioceses, *105*

Common Recovery.

1. Common recoveries favoured in law, especially where they are suffered for a valuable consideration, *125*
2. Though there be no tenant to the *Præcipe*, yet a common recovery is good by way of estoppel, against *Vol. X.*

the party that suffered it; but not against remainder men, strangers, &c. *Page 45*

3. Whether a tortious fee gained by entry, be sufficient to maintain a recovery? *124*

Condition.

1. In wills, grants, or contracts, the law will interpret words not at all proper, to amount to a condition, rather than the intention of the parties should be violated, *189, 222*
2. Covenant to pay so much money, the plaintiff making to the defendant such an estate in such land, and declared *licet paratus*, &c. he had not paid the money. Defendant pleads, plaintiff had not made such an estate, and resolved upon demurrer, That this was a precedent condition, *154*
3. Debt upon bond, conditioned, That if the defendant resigned his living by such a time, for a certain pension to be conveyed to the parson, then, &c. Conveying the pension adjudged to be a precedent condition, *14 Hen. 4. 223*
4. Debt upon bond conditioned for the payment of 1500*l.* the plaintiff assigning over to the defendant such a judgment. Court at first divided; but finally held That the assigning the judgment was no precedent condition, but a concomitant act; and that the defendant could not justify non-payment without pleading a tender, though he was not bound actually to pay the money without the assignment, *153, &c.*
5. When a condition is in the disjunctive, if one part of the condition becomes

becomes impossible by act of God, the obligor is discharged from the performance of the other part,

Page 268

6. When a condition that is to create an estate cannot be literally performed, it shall be intended as performed by construction of law, if the intent and meaning of the condition be observed, 420

7. Where the benefit and advantage of a condition is in truth and effect passed over to a third person, notwithstanding that maxim of law, That a stranger cannot take advantage of a condition, 423

Confession.

In convictions before justices of peace, confession of the party will supply the want of summons, 280

Consideration.

1. Where a grant is made upon a valuable consideration, it shall give the fee, though the word *Heirs* be not mentioned, 47

2. Where the consideration of a marriage settlement shall be construed to extend to all the uses in the settlement; and where not, 533, &c.

Conspiracy.

1. Is a formed action, 219

2. Greater difference of opinions about actions of conspiracy than any other species of actions, *ibid.*

3. Will not lie for a malicious indictment, where the indictment was insufficient, 216

4. Nor without acquittal, 146, 219

5. And that such an acquittal as may be pleaded in bar to another indictment, 216

Continuance and Discontinuance.

1. A continuance nothing but a *Curia advisare vult*, Page 325

2. If a defendant pleads a plea in abatement, and the plaintiff replies as to a plea in bar, it is a discontinuance, 112

3. Whether appearance and demurrer will aid a discontinuance, as well as appearance and pleading over? 87

4. Costs paid upon leave to discontinue, 228

Contracts.

1. The validity of contracts can never depend upon subsequent contingencies; but must be either good or bad at the time they are made, 67

2. In case of a contract for the sale of land, the vendor is deemed in equity a trustee for the vendee, till the conveyance is executed, 527

Conviction.

1. Conviction before justices for killing conies, in a warren inclosed, warranted by stat. 22 & 23 Car. 2. c. 25. 279, 280

2. Conviction of deer-stealing in the absence of the offender, upon stat. 3 & 4 W. & M. adjudged to be good after summons, 248, &c. 341, &c.

3. Between such a time and such a time he stole a deer, is a sufficient setting forth the time of the offence in the information, 248, &c.

4. Nor is any greater certainty as to the time to be required in the proof, *ibid.*

5. Witness sworn *de veritate præmissorum* not sufficient in convictions; because the nature of the evidence ought to appear to the court, 213

6. Yet

6. Yet oath made *de veritate præmissorum* has been held sufficient, in *Margine*, Page 213
7. Whether *debite summonitus* be a sufficient setting forth of the summons? 213
8. A conviction upon stat. 5 *Ann.* for preservation of the game, quashed upon divers exceptions, 26, 27
9. Conviction upon stat. 8 *Ann.* about the assize of bread, quashed for want of certainty in the charge; it being only said That the bread wanting so much weight was bought in the defendant's shop, whereas he ought to have been charged *directly* with the sale of it, 155, 156

Conusance of Pleas

1. Conusance of pleas *triplex*, 129
2. Where courts have a concurrent jurisdiction, priority of suit gives the preference, *ibid.*
3. Where conusance of pleas is granted with exclusive words, the party impleaded may make the claim; otherwise only the Lord, 127
4. Other differences taken between conusance of pleas with and without exclusive words, 126, 127
5. Of the time of claiming conusance, 127
6. The claim adjudged to come too late after imparlance, 129
7. It may be claimed notwithstanding the suit is brought in the Exchequer by *Quo minus*, 128

Copyhold and Copyholder.

1. Copyhold lands deviseable without a surrender, where the testator has only an equitable and not the legal interest, 519, 529
2. Equity may supply a defective surrender, 471

3. Or even decree one where there is none, Page 471, 498
4. But this ought to be done only in favour of purchasers and creditors, 471
5. Or of wife and children, who are considered in law as purchasers and creditors, 471, 497
6. A copyholder in fee, surrendered to the use of the mortgagee in fee, but before the presentment of the surrender became a bankrupt. This defective surrender established by Lord *Cowper* against the creditors, 492, 494, 495
7. A decree of Lord *Somers's* to supply a surrender in favour of a grandchild, reversed in the House of Lords, 471
8. A defective surrender denied to be made good in case of a wife provided for before, *ibid.*

Corporation.

1. A corporation must either be by charter, or prescription, 147
2. Cannot subsist without a head, 346
3. So that if a mayor be not chosen within the time prescribed by the charter; and there is no provision in the charter, for the old mayor's continuing in his office till a new one be chosen, the corporation is dissolved, *ibid.*
4. Not in the power of the *quondam* corporation in such case, to revive itself by choosing a new head, *ibid.*
5. Whether they may be empowered by a writ under the great seal to proceed to a new election? *ibid.*
6. Or whether it be not necessary for them to obtain a new charter from the crown? *ibid.*
7. Of the qualifications necessary to corporation officers, 65, 100
8. Whe-

8. Whether the offices in a corporation are void or only voidable, when exercised by persons not qualified by receiving the sacrament, according to the statute of *Charles 2*? Page 65
9. Whether a power of disfranchisement be a power incident to every corporation; or whether it must be given by express words in the charter? 175
10. Whether a corporation can call the election of any of their members into question after admission? 875.
11. And upon supposal they may, Whether they can expel members not qualified, without summons to make their defence? 101, 102
12. The acts of a corporation, shall not be vacated for want of summons to such persons as are *de facto* disfranchised, though still members *de jure*, 76, 77
13. Where by the charter of incorporation, the mayor, recorder, (or in his absence, deputy-recorder) and capital burgesses, *vel major pars eorundem*, are impowered to choose capital burgesses; such elections may be made without the presence of the recorder (or his deputy) for the *major pars eorundem* refers not only to the capital burgesses, but to all the persons before named, 74, 75
14. And therefore though the presence of the Mayor be necessary to corporate acts, it is not because he is particularly named; but because he is the head of the corporation, 75
15. If a charter requires acts to be done by a majority of the corporation, no persons can be removed but by a majority of the *whole* number, including the persons to be removed, 76
16. Where persons elected are to be sworn in before a majority of the

corporation *tunc ibi presentium*. Whether such words make it necessary for this to be done before a majority of the whole number, or only with the consent of the major part of such as are present? Page 76

Costs.

1. Costs may be given in the spiritual court, 262
2. Costs paid in debt upon bond, notwithstanding tender and refusal before action brought, 26
3. Motion That the defendant should pay costs, because a third person had claimed consance of the pleas and was refused, not allowed, 156

Covenant or Covenants.

1. Bond conditioned for the payment of so much money to *H. H.* assigning over a chose in action to the obligee. If the money be paid, and no assignment made, covenant will lie against *H.* 223
2. Lies upon a covenant in law by *Dimiss*, without shewing an eviction, 143
3. Covenant That the lessee shall quietly enjoy against all claiming, or pretending to claim a right in the premises, extends to all interruptions, be the claim legal or not; provided it appear That the disturber does not claim under the lessee himself, 384
4. Where covenants relate to land, they run with it, and attend upon the reversion, so that the heir may bring the action, 158
5. Covenants founded upon valuable considerations are looked upon by a Court of Equity in the same light, as if they were actually performed, 467

6. And in case there are any legal defects in the execution of such covenants, they shall be aided by equity,

Page 467

7. Covenant for the sale of lands, and after the money paid, the vendor before conveyance confessed judgment to a creditor; Lord Cowper of opinion this should not affect the purchaser, because in equity the land is esteemed to be sold from the time of the covenant, 468,

498

8. So where one covenants to sell and convey, and dies before conveyance, equity will compel the heir to execute the sale, 469

9. Otherwise if the vendor be tenant in tail, 469, 376, 478

10. Yet if one be tenant in tail, with a power to make leases for three lives, and covenants to make such a lease, his covenant shall bind the heir, 469

Court, or Courts.

An uniformity of practice in the courts of law to be wished and endeavoured, 278

Court of Honour.

No suing for fees in this court, 264

Custom.

1. All unjust and unreasonable customs void, 133

2. Yet a custom for the advantage of a particular person to have the sole use of a trade in a certain place, may be good; provided he has stock enough to serve the place, 131

3. The same for a corporation, *ibid.*

4. And persons not supposed to use the trade, may yet by custom have a prerogative *ratione Domini*, That

no body shall use such a trade within such a compass, without licence from them first obtained, Page 131

D.

Damages.

1. One may be damnified either in person, reputation, or property; and each of these may be a just ground of action, 217

2. But no action will lie *ad damnum, absque injuria*, 133

3. Whenever a man is kept out of a just debt, the law implies and supposes a damage, 277

4. And in every action of debt, damages are given by the common law *occasione detentionis debiti*, 772

5. But where a penal sum is recovered, damages are never given, *ibid.*

6. Interest is *now* allowed by way of damages, for delay of payment, 274

7. And where judgment is by default, the court may give the damages, without a writ of inquiry, *ibid.*

8. Motion upon stat. 3 Hen. 7. cap. 10. That the defendant in a writ of error brought into B. R. should be allowed interest by way of damages, from the time of the judgment in C. B. pending the writ of error; refused, 274, &c.

9. Damages and costs are in law sometimes used as synonymous terms, 275

10. Question upon a prohibition to the spiritual court, Whether the cause being originally of temporal consequence, damages ought not to be given by the jury of inquiry, for all the proceedings from the beginning of the suit? But the court was of opinion (only Pratt doubted) That damages should be given for nothing

more than the proceedings subsequent to the delivery of the prohibition, Page 319. &c.

11. The first new trial was granted for excessive damages, 202

Debet & Detinet.

Where the action must be brought in the *Debet & Detinet*; and where in the *Detinet* only, 12, 136

Debt.

1. Definition of a debt, 162

2. If debt be brought for a sum of money, part whereof has been paid, the defendant cannot plead this in bar to the action, 324

3. Upon a *Nisi debet* pleaded, the jury may sever in their verdict, and find part for the plaintiff, and part for the defendant, 7

4. If the declaration be for less than the action brought, this will be variance between the writ and the count, *ibid.*

5. So if more appears to be due by the declaration, than what was demanded in the writ, it is a good cause of demurrer, and cannot be helped by a *Remittitur*, 69, 70

6. For in actions of debt that lie for a sum certain, no demand can be of a lesser sum, without shewing how the rest of the debt is satisfied, 7, 69, 70

7. But where the action lies in damages, it is otherwise, 69, 70

8. In debt against an executor the action must be brought for the whole sum that is due, let the assets be ever so small, that new actions may be prevented in case of an increase of assets, 324, 325

9. Debt will not lie for money and interest, *ibid.* Page 277

10. Lies against a gaoler for an escape, Whether matters trespassable or not, 95

Declaration.

1. Where the declaration is the first step in the action, it is erroneous, 211

2. If a declaration be delivered generally of any term, it has relation to the first day of the term, 340

3. But a special *Memorandum* may be entered afterwards upon the record, to explain what day of the term it belongs to, 340

4. And that without motion, per Parker and Pratt, contra Eyre, 340

5. Where the title is of one sort of action, the declaration can never change it to another, 210

6. But it may make a fatal variance between the writ and the declaration, *ibid.*

7. The words used in a declaration shall ever be taken in the strongest sense against him that uses them, 331

8. And yet see where and how far they may be supported by a necessary intendment, *ibid.*

9. Surplusage in the declaration does no hurt, 254, 255

10. In transitory actions the plaintiff may declare at any time or place, 349

11. Only the time alledged must not be subsequent to the bringing of the action, 251

12. Where an action is brought upon a deed dated in foreign parts, some place in England should be alledged *pro forma*, 255

13. And yet when the plaintiff declared upon a deed dated at *Port St. George in Indibus Orientalibus*, it was held well; because the words

in

in Indibus Orientalibus did not (it was said) necessarily import the place to be out of England, Page 255

14. Whether matters traversable may not in some cases be set forth only by way of recital, or whether they must be always positively averred?

15. Declaration by assignee of bail-bond held naught for want of averring the return of the writ, *ibid.*

16. Whether in debt upon judgment in B. R. pending error in the Exchequer Chamber, the declaration should be upon a record in B. R. or in Exchequer Chamber? 16, 17

17. In an action on the case plaintiff declared for inclosing so many acres of land, parcel *Communie Pastura*, and held well after verdict; though in legal proceedings, the word *Communie* generally signifies not the place but the right of commoning, 184

Decree.

1. A decree against a tenant for life will not bind the issue, 480

2. A decree in Chancery, reversed, 471

3. A decree in the Exchequer reversed, 504

Deeds and Conveyances.

1. Antedating deeds in some cases felony, 441

2. A deed when lost by an inevitable accident, may be proved by a copy, 8

3. But not by parol evidence, though there should be no copy, (*durum*) *ibid.*

4. Yet held that parol evidence should be allowed to shew the contents of a deed that was not lost, but proved to be in the possession of the other party, *ibid.*

5. According to the common rules of indenture, the words of a deed are the words of all the parties, Page 47, 48

6. Deeds are to be interpreted, as much as possible, according to the intention of the parties, 47

7. the grantor's name omitted in the body of a *tripartite* deed, deed supplied by the intention, 45, &c.

8. It is a maxim of law, That a deed shall never be construed void, if it can by any means be made good, 46

9. Where the conveyance will not take effect the way it was intended, there rather than it should have no effect, it shall pass by another way than what the parties designed, 35

10. What deeds and conveyances shall be deemed void and fraudulent *quoad* creditors; and what valid, 247, 480, &c.

11. Defects in voluntary conveyances, not much favoured in equity, 469

12. But equity will decree conveyances, or supply the defective execution of powers in favour of creditors and purchasers, 471

13. Or in case of making provision for younger children, 471, 497

14. In voluntary conveyances provision or no provision material, but not in those founded on valuable considerations, 478

Defence.

1. Where no defence is made, the courts at law take the matter *pro confesso*, and give sentence for the plaintiff, without obliging him to prove the truth of his case, 440

2. The same practice in the Court of Chancery, 431

3. But

3. But it is otherwise in the Spiritual Court, where proof is required, Page 440

Demand.

1. Whether if debt be brought upon a note in a case where a demand is necessary, the action itself be not a demand? 38
2. In escape brought against the Marshal of the King's Bench, upon 8 & 9 W. 3. cap. 27. Court inclined to think the demand for producing the prisoner, no particular hour being appointed in the notice, ought to have been at the latter end of the day, and not at twelve o'clock, 396, 397
3. And likewise That the demand ought to have been upon the deputy Marshal, and not upon a turnkey, *ibid.*
4. But held That in case of non-attendance, a demand at the prison, though no body there, would be sufficient, 396, 397

Demurrer.

1. Motion upon stat. 4 & 5 Ann. for leave to plead and demur at the same time, refused; because a demurrer is no plea, but an excuse for not pleading, 280, 281
2. There can be no demurrer upon a demurrer, 281
3. Such defects in pleading as are only matters of form, and would be cur'd by verdict, are now aided upon a general demurrer by stat. 4 & 5 Ann. for amendment of the law, 348
4. No advantage can be taken of a double plea upon demurrer, without setting forth in the demurrer, wherein the doubleness of the plea consists, 263

5. If one pleads in bar to an action such matter as goes but to part of the action, it is good cause of demurrer, Page 323, 324

6. Where a man has good cause of demurrer at the time of his demurring, no act of the other party afterwards will make it naught, 69
7. Where the plaintiff has no way to help himself but by demurrer, 267
8. If a defendant in debt upon bond, who has a good defence upon the merits, should hazard and lose his cause upon a demurrer, equity will not relieve him, 203
9. Debt against two executors, one of the defendant's plea bad; plaintiff has good cause of demurrer to both pleas, 323, &c.
10. Though the demurrer be to several pleas, yet *Placitum pradietum* in the singular number held well; for *Placitum* is *nomen collectivum*, and to be taken *reddendo singula singulis*, 324
11. Demurrer to an appeal of murder for divers exceptions, 86
12. Debt upon bond conditioned to pay so much to J. S. and J. N. *tam cito*, as they came of age; judgment upon demurrer *pro Quer.* because the defendant did not say when they came of age, 329
13. Debt upon bond conditioned to pay J. S. his executors, &c. the interest of 1000 l. from time to time as it should become due. Defendant pleads he paid to R. S. *tantum quantum* became due. Judgment upon demurrer *pro Quer.* because not shewn That J. S. was dead, and that R. S. was his executor, 330
14. Whether the plaintiff had not another cause for his demurrer by reason of the defendant's not shewing what was due, nor what was paid? 4

15. Special demurrer to a replication, for concluding *Et de hoc ponit se super Patriam*, instead of *Et hoc petit quod inquiratur per Patriam*; disallowed, Page 116

16. Where the plaintiff had judgment upon a special demurrer, for want of the defendants concluding their plea in bar to the country, 160, 243, 247, 248

Departure.

1. Varying from things immaterially alleged, no departure, 251

2. Therefore varying in the replication from the time or place laid in the declaration, is no departure in transitory actions, 349

3. Though by the old books this would have been a departure, *ibid.*

4. If in debt against bail the defendant pleads no *Capias*, and rejoins That the *Capias* was suspended by error, 'tis a departure, 257

Depositions.

Depositions in a Chancery cause, tho' the bill and answer happen to be lost, may be allowed as evidence to supply any point in a will, where the will is silent; but not to contradict it, 15

Descent.

1. The heir shall be esteemed *in* by descent, where the land might possibly have vested in the ancestor, 421, 425

2. Where an heir shall be *in* by descent of an estate, which could never vest in the ancestor, 421

Devise.

1. Devise included in the legal sense of the word *Purchase*, 92, 95, 234, 242, 483, 547

VOL. X.

2. Devise of lands to the poor of a parish is a void devise, Page 94

3. Where there is no devisee at the death of the testator, when the will is to take effect, the devise is void, 371, 372, 421

4. Devise of lands to *A.* in tail, *A.* dies leaving issue male in the life-time of the testator, the devise is void, and the issue cannot take, 98

5. No difference in this respect, between a devise in fee and in tail, 99, 374, &c.

6. Whether a republication of the will after the death of *A.* shall make a difference? 98, 99, 375, 376

7. Devise to *A.* in tail, remainder to *B.* and the issue of her body, remainder to the right heirs of *A.* for ever. *A.* dies without issue living the testator; *B.* after the making of the will has issue *C.* found to be heir at law to *A.* and dies likewise in the life-time of the testator. Adjudged a void devise, and consequently that the devisors heir at law, and not *C.* should have the land; those words, *issue of her body*, and *remainder to the right heirs of A. for ever* being held words of limitation and not of purchase, 369, &c.

8. Devise to *A. B.* and *C.* to take successively, void for the uncertainty, 104

9. *Aliter* where the devise was to *A.* and his two brothers *successive*; for in the case of brothers, the law directs who shall take first; and here the person named in the will, was found by verdict to be the eldest brother, 103, 104

10. A latter devise, though void, is a revocation of a former, if inconsistent, 94, 233

5 H

11. But

11. But revocations from inconsistencies will not be admitted, unless where the inconsistency is plain and unavoidable, *Page 521*
12. Therefore, if there be two devises in a will of the same lands, the law will make the devisees jointenants, rather than the latter devise should be esteemed a revocation of the former, *512*
13. A devise of all the *personal* estate, will pass whatever personal estate the testator dies possessed of, *522*
14. But by a devise of all the *real* estate, no more will pass than what the testator had an interest in, at the making his will, *ibid.*
15. The reason of this difference, in the devises of *real* and *personal* estate, assigned by the Lord Chancellor, *ibid.*
16. Another reason of this difference offered by the Author of the Reports, *ibid.*
17. Whether the testator's manuscript works will pass by a devise of all the residue of his personal estate? *530*
18. Whether they will pass by a devise of household goods and furniture; *531*
19. Devise of a shilling to an eldest son in satisfaction of all claims, decreed sufficient to exclude him from his distributory share of the testator's personal estate not disposed of, *524*
20. A devise of the surplus of lands (to be sold for the payment of debts and legacies) is in equity a *real* devise, *93, 237, 483, 537*
21. In such case the residuary legatees may pay the legacies, and pray to have the land, *91, 240, 241*
22. If lands are devised to be sold for the payment of debts, and are of no greater value than what is sufficient

- for that purpose, Whether the creditors may pray to have the lands? *Page 91, 94*
23. A devise of the profits of land will even at *Law* pass the land itself, *94, 287*
24. Whatever is descendible to the heir at law as real estate, is devisable as such, *528*
25. The word *Lands* sufficient to pass a fee-farm rent; especially where it appears to be the intention of the testator that it should pass, *526*
26. Testator seised of a fee-farm rent issuing out of the manor of *F.* and of no other land, devised his manor of *F.* to *J. S.* Held the fee-farm rent well passed, *525*
27. Testator seised of a portion of tithes in fee and nothing else, devised all his *free lands*. Tithes passed, *525, 526*
28. Land contracted for in *April*, testator makes his will in *June*, and devises his freehold lands to trustees, time fixed by articles for the conveyances was at *Michaelmas*. Decreed by Lord *Harcourt* the land passed, *528*
29. Devise in a codicil of all the lands purchased since the making of the will. Decreed that all the lands contracted for, as well those which had not been conveyed, as those which had, did pass by the codicil, *526, &c.*
30. *A.* devises all his land, &c. when he had no land, but only had obliged himself by marriage articles to purchase lands to the value of 1400*l.* Decreed by Lord *Harcourt*, and affirmed upon a rehearing by Lord Chancellor *Cowper*, That the 1400*l.* should be considered as real estate, and was well passed by the will, *528*
31. Where

31. Where the testator devises his lands to be sold for the payment of debts, equity will decree a sale of the lands purchased afterwards, tho' there were no articles entered into precedent to the will, Page 529
32. Land devised to the wife of J. S. J. S. dies, the wife marries J. D. and then the deviser dies. The wife of J. D. shall take the land, 371
33. Where a devise is to children, a grandchild cannot come in to take as one of the children, 376
34. A devise of lands to the heir after the death of the wife, gives by implication an estate for life to the wife, 417
35. Otherwise where the devise is to a stranger, *ibid.*
36. J. S. having several sons and daughters, devises his land to H. his youngest for the term of his life, he or his heirs paying such and such annuities to the rest of the testator's children; and after the death of H. and his wife, to go equally among the sons and daughters of H. Lord Chancellor of opinion, That the wife ought to have an estate for life by implication; and that the testator's eldest son and heir, who claimed the land (as not disposed of by will) during the intervening time between the death of H. and the death of his wife, was excluded by the annuity. But this being matter triable at law, he directed an issue accordingly, 416, &c.
37. A devise of lands to wife for life, then to dispose of according to her pleasure, provided it be to some one of the testator's children, gives an estate for life with power to dispose in fee, 31, &c. 71, &c.
38. A term was devised to A. for the term of his natural life, and no

- longer; remainder to such of his issue to be begotten, as he should devise the same unto; and if he should die without issue, the residue of the term was devised to B. Devise over to B. good; for those latter words *die without issue* are here to be understood in the vulgar sense, (*viz.* die without issue *living at the time of his death*) and raise no estate-tail by implication to A. he having before an express estate for life, with power, &c. Page 402, 403
39. A devise to J. S. for the term of his natural life only, without impeachment of waste, then to the issue male of his body, remainder to the heirs males of the body of that issue. The devisee made tenant for life, remainder to the issue in tail, 181, &c.
40. If a devise be made to H. and to the issue (or to H. and to the children) of his body, it passes an estate-tail, 376
41. But if the devise be to H. and after his death to his children, or his issue; the issue shall take by way of remainder, 376
42. Devise to J. S. and his heirs passes an estate in fee, 374, 375
43. No other difference between a devise in fee and in tail, but only that in the one case the devisee has a greater choice and variety of ways to defeat the issue, than in the other, 374
44. A devise of lands to trustees, tho' the words *and their heirs* be omitted, shall convey to them an estate in fee, if no other estate can support the uses designed by the testator in the devise, 523
45. One devises his lands to trustees and their heirs for the term of 500 years, for payment of 50 l. per Ann. to A. the eldest son of deviser during

ring life; and after the determination of the said term, then to the eldest son of *A.* in tail-male; remainder over to *B.* second son of devisor. *A.* has no issue at the time of the testator's death. Case stated and sent to the Judges of *B. R.* who certified their opinion to be, That the devise to the eldest son of *A.* was void; and that the remainder to *B.* was vested in him upon the death of the testator: But the Lord Chancellor declaring, he thought the intention of the testator, not to disinherit the issue of his eldest son, ought to be supported if possible; and ordering the cause to stand over, the parties agreed it, Page 501, 502

46. One devised land to his wife for life, remainder to his second son *A.* in fee; provided and nevertheless, That if his third son *B.* should within three months after the death of the wife pay 500 *l.* to *A.* then he devised it to *B.* and his heirs. *B.* dies after the testator, in the life-time of the wife. Decreed the heir of *B.* might pay the money, and should take the land as an executory devise and by way of descent, 419, &c.

47. Before what time an executory devise of a fee upon a fee was not allowed, unless upon a contingency to happen during the life of one or more persons in being at the time of the settlement, 422

48. But the law is now settled, That in case of a contingency, which cannot in the nature of it precede the death of a person, a reasonable time may be allowed subsequent to the decease of that person for the performance of the condition, and a fee limited thereupon is good, 422

49. In such case a year has been held no unreasonable time, Page 422

Disability.

1. Disabilities by common law of three sorts, 359
2. Disability *propter delictum*, ibid.
3. Disability *propter defectum subjectionis*, ibid.
4. Disability *causa professionis*, 360
5. Of Disabilities created by statute, 89
6. At the common law no person allowed to void actions by pleading disability in themselves, 161

Discretion.

1. *A.* by will disinherits his son in favour of *B.* and tells *B.* if his son should behave himself respectfully to him, and not disturb him in the enjoyment of his estate, he might if he thought fit, give him twenty or forty pounds per quarter. Decreed, That *B.* should pay the forty pounds per quarter to the son, notwithstanding he had first brought an ejectment at common law against *B.* and after that a bill in equity, 404
2. A daughter devises all her personal estate to her mother, to dispose of as she should think fit, and tells her mother, You may if you please give 180 *l.* to my niece, but I leave it entirely to you. Decreed the mother should be esteemed a trustee for the niece, and should pay her the 180 *l.* (but without interest) notwithstanding general misbehaviour alledged in the niece, 404, 405
3. But held the trust might have been forfeited, had particular instances of misbehaviour been assigned, 405

D

Disseisin and Seisin, Disseisor, Disseesee.

1. Seisin implies a freehold, *Page* 125
2. An entry in pursuance of a void lease, to be taken for a disseisin, 265

Distribution.

The estate of an intestate made distributable by several ancient laws, almost in the same manner as it is now by the statute of *Car. 2.* 442

Double Plea.

1. By statute 4 & 5 *Ann.* for amendment of the law, the defendant in any action or suit may, with leave of the court, plead double, if he shall think it necessary for his defence, 280
2. But it is the duty of the court not to assist the defendant by giving leave to plead double, unless upon probable ground that the demand of the plaintiff *quoad* the defendant cannot be maintained, 335
3. Whether a defendant in error may have leave to plead double by virtue of this statute? 326, 327

E

Ecclesiastical Court.

1. The ecclesiastical court may proceed by their own rules, in matters of form (though not substance) even in those things, wherein they derive their jurisdiction from the statute law, 64
 2. Whether proctors may sue in this court for fees, resolutions both ways, 264
 3. But extortion in taking fees allowed to be tried here, 263
- VOL. X.

E

4. Some kinds of defamation not of spiritual conusance, *Page* 71
5. If words of spiritual conusance are spoken in a place where they are punishable by virtue of any particular custom, the jurisdiction of the spiritual court is taken away, 439, 440
6. The trial of a custom may not be permitted in the spiritual court, because the proof required there is very different from *that* required at common law, 441
7. Though a prescription concerning the right of choosing church-wardens, be a matter triable at common law, by a jury; yet sentence must be given in the spiritual court, 12
8. Appeals are to be made within fifteen days after sentence, by statute 24 *Hen. 8. cap. 12.* 386
9. In what cases, and how far, the ecclesiastical and temporal courts may exercise a concurrent jurisdiction, 385, 386

Ejectment.

1. Ejectment is a possessory action, 177
2. Yet unless the person turned out (though by one that had no right) can prove his title, he shall not recover, *ibid.*
3. It is a maxim of common law, that a man may try his right by ejectment as often as he pleases, 2

Election.

Where and how far equity will determine the election the party hath at law, 462, 487, 489

Elegit.

1. An *Elegit* which set forth judgment to have been given on the 9th 5 I of

of January, when in fact it was given upon the 23d of October, and signed the 9th of January, denied to be amended, Page 67, 68

2. Where an *Elegit* was held amendable, 68

Equity.

Where the intention of doing a thing plainly appears, Want of circumstances shall not avoid the act in equity, 467

Error.

1. A writ of error is a writ of right, 275

2. It is a remedy given the party by the common law, 282

3. Writs of error into the Exchequer-Chamber are given by statute 27

Eliz. cap. 8. 275

4. Where a writ of error varies from the record, the record is not removed, 367, 368

5. Difference, as to the removal of the record, when writs of error are of judgments given in the superior courts, and when in the inferior, 17, 142

6. No diminution can be alledged of records out of the inferior courts, 172

7. In debt, if the writ of error be *de placito debiti* generally without distinguishing whether bond, &c. it is sufficient, 226

8. So in trespass, *ibid.*

9. The same in dower, *ibid.*

10. Where Want of abridgment was assigned for error in a writ of dower, and not allowed, *ibid.*

11. Want of an original was assigned for error in an action of debt, and upon the return to a *Certiorari* it appeared, That the original was a *Quare clausum fregit*. Court of opinion the judgment should be re-

versed because of an ill original,

Page 318, 319

12. Where the Want of fifteen days between the teste and the return of the writ shall not be cause of error, 82

13. Matter pleadable in abatement, may not be assigned for error in fact, 166

14. In case without writ or bill, where the plea, as to the matter of it was in abatement, but concluded as a plea in bar, *petit judicium de narratione*, error insisted upon, That there should have been no final judgment, but a *Respondeas Ouster*; disallowed, 192, 210

15. *Assumpsit* brought by an executor upon two promises made to the testator, and one to himself, and after a *Remittitur* entered upon the two first promises, and judgment obtained on the third, error assigned That the probate was void, as appearing upon oyer to have been dated four months before the time alledged for making the promises to the testator. But the court held, That those promises having been yielded naught by the *Remittitur*, the probate should be deemed good, and the time of the promises taken, 170, 171

Escape.

1. Escape brought against the marshal of the King's Bench Prison, upon statute 8 & 9 W. 3. cap. 7. 394, &c.

2. One day's notice in writing to be given for producing the prisoner, 394

3. Whether the particular time of day, as well as the day itself, ought to be specified in the notice? 395, 396

Estate.

Estate.

1. An estate in fee-simple, tail, or for life, by what words of a will it may be created, see *Devise*.
2. Of vesting and re-vesting of estates, Page 369, &c. 369, 412, &c.
3. Where and by what means, an estate of inheritance once vested, may be turned into a meer possibility, 412, 413
4. A future interest in an estate of inheritance will descend to the heir, 421
5. A power to dispose of an estate in fee, may be executed in tail, 31, 71

Estoppel.

No estoppel will bind the crown, 200

Evidence.

1. If a plaintiff in Chancery makes any one a defendant without cause, he shall not be allowed the benefit of his evidence, 19
2. But it is otherwise in the case of trustees; for the plaintiff may make use of their evidence, though they be defendants, because it is necessary to make them so, 20
3. Where there are several defendants in Chancery, each of them may make use of the evidence of the rest, 19
4. The chirograph of a fine shall not be falsified by parol evidence, 42
5. Nor by the date of the concord, though *that* be matter of record, 43, 44
6. Parol declarations not to be allowed (*ordinarily*) as evidence to explain wills, 99
7. No regard to be had to them in a devise of lands, 418

8. Lands devised to *A.* in tail, who dies in the life-time of the testator, leaving issue male, and then the will is re-published: Parol declarations of the testator offered in evidence, to prove it was his intention, That the issue male of *A.* should take by the will; but refused, Page 99

9. Law the same even where the parol declaration is referred to by the will, *ibid.*

10. Yet parol evidence may be admitted to explain a will in affirmance of the common law, and to oust a rule in equity, 99, 400

11. Therefore where the *Residuum* was undisposed of, parol evidence was received, to prove the testator did design his executor should have it, *ibid.*

12. And parol evidence is good in wills by way of averment, where two things or two persons are of the same name; and *that* in the case of real devises, 100

13. The copy of a revocation of the deputation to an office, offered in evidence of the revocation, disallowed; because it did not appear but the original might have been produced, 74

14. A copy of the condemnation of a ship in the admiralty court of *France*, was offered in evidence at *Nisi prius B. R.* but refused for want of the seal of the court, 108, 109

15. Copy of a rule of court, to make it evidence in any other court, must be signed by the Judge himself, 109

16. But at *Nisi prius*, where it is the same court, it is sufficient if it be signed by the officer of the court, 2 *ibid.*

17. Where

17. Where no other evidence of an act of parliament shall be allowed, but an exemplification of it under the great seal, Page 126
18. Many authorities in the Court of Chancery where bonds have been considered as evidences of agreements, 518
19. A bond conditioned for the performance of a marriage agreement; decreed the obligor should not be permitted to forfeit the penalty, but that the bond should be taken as an evidence of the agreement, 597, &c.
20. A bond conditioned for the surrender of a copyhold upon the payment of 200*l*. Decreed to be taken as an evidence of an agreement for a surrender on the part of the obligor, 515, &c.
21. What is given in evidence in one *Action*, cannot be made use of as evidence in another, 292

Excommunication.

A precedent conviction of the offender necessary to excommunication, even where the statute says he shall be *ipso facto* excommunicated, 65.

179

Excommunicato capiendo.

1. If a person remains forty days excommunicated, upon a *Significavit* thereof to the Court of Chancery, the writ *de excommunicato capiendo* is issued of course, 71, 352
2. But it must be opened in *B. R.* and delivered to the sheriff to be executed in the presence of the Judges, 351, 352
3. And may be quashed before it is delivered, 352
4. Though the practice is not to enter at large upon record the writs that

issue out of *B. R.* before the *Return*, yet this writ is always entered at large upon the delivery, Page 352

5. The standing forty days excommunicated need not be inserted in the writ, 71
6. But the special cause of excommunication must be inserted, so far as that it may appear to the court to be of spiritual conusance, 350, 351
7. In *quodam negotio* concerning the correction and reformation of manners, too general, *ibid.*
8. *Pro causa defamationis*, well, 71
9. The addition of *Cbiotbecario*, instead of *Cbirotbecario*, no good exception to the writ, *ibid.*
10. A writ *de Excommunicato capiendo* superseded before the return, 353
11. Never superseded before the return until now, *ibid.*

Execution.

1. If judgment be general, execution must be so too, 270
2. But if a judgment be for two distinct sums, *Quare*, Whether the one may not be released, and execution taken out only for the other? 307

3. Of fees for serving execution, 85

Executores.

1. If there be two executors, each of them has an interest in, and a power over the whole estate of the testator, 324
2. An executor may release, but he cannot bring an action before probate, 171
3. A woman that is executrix or administratrix, though a feme covert, may sue sole in the spiritual court, 64

4. If

4. If one be sued as executor, the action must be in the *Detinet* only, Page 163
5. Yet if the executor pleads an ill plea, judgment shall be given *de bonis propriis* as to damages and costs, 324
6. An executor after entry upon the testator's term is chargeable in the *Debet & detinet* for rent or non-repair, 12
7. But if he be charged as executor, though for non-repair in his own time, judgment shall be *de bonis Testatoris*, 255
8. He may not be sued in one and the same action for debts due from the testator and himself; because the judgment is different, 173
9. Neither may he join in the same action, debts owing to himself, with those due to the testator, 171, 172
10. Yet when an *Indebitatus Assumpsit* was brought by an executor upon three promises; two of which had been made to the testator, and the third to himself, after settling an account with the defendant, of the dealings between him and the testator: The court were of opinion, these promises might be joined in one action; because *here* the pleading, the judgment, and the effect of the judgment, must be *all* of them the same as they would have been in separate actions, 171, &c.
11. But where one joined in the same actions, several promises to the testator, with a promissory note made to himself as executor, but payable to the plaintiff or order; the court gave judgment upon demurrer, for the defendant; for the plaintiff might either have brought his action upon this note without naming himself executor, or might have transferred it to any other person by indorsement, Page 315, 316
12. In case of death before such note is either received or transferred, it will go to the administrator of the executor, and not to the administrator *de bonis non*, &c. 316
13. An executor may be sued in his own name upon a promise to pay a debt of the testator's at a future time, 254
14. And if he be named as executor, it will be only surplusage, 255
15. But without forbearance no advantage can be taken of such promise, 255
16. If debt be brought against an executor for a larger sum, than he has assets left sufficient to discharge, yet if he has any assets at all he cannot plead *this* in bar to the action, 324
17. Executors pay no costs upon writs of error, though the judgment be *de bonis propriis*, 276, 277
18. If a creditor be made executor, he has a preference given him by law, 496
19. The law likewise allows him among debts of equal degree, to give a preference to which he pleases, 495, 496
20. And at any time by confessing a judgment, he has it in his power to give the preference to a simple contract creditor, before creditors of a superior nature, 428, 495, 496
21. And where payment is actually made to this judgment creditor, equity cannot relieve, 428
22. Otherwise where the executor makes a fraudulent use of his power, equity will interpose, 496
23. But a Court of Equity will never take from the executor himself the preference the law gives him, 496, 497
24. No

24. No difference between the words, *I make A. my executor*, and *I make A. executor of all my personal estate*,
Page 441

25. For the making a person executor, does in law imply an absolute gift of all the personal estate, if it be not restrained by the declared intention of the testator, 441, 442

26. Therefore where there is no residuary legatee, by the common law the *Residuum* of the testator's estate shall go to the executor, 99

27. But a contrary rule has obtained in equity, *ibid.*

28. Unless when it appears by collateral proof, that it was the intention of the testator, the executor should have the *Residuum*, *ibid.*

29. An executrix having a legacy left her, submits in her answer to a bill brought for that purpose, That the surplus of the testator's estate should be divided according to the statute of distributions; and decreed accordingly, 398, &c.

30. But at the same time the Lord Chancellor declared, he was not satisfied with the notion, That a legacy to an executor excludes him from the surplus; and therefore that without her submission he did not know, whether he should have decreed a division or not, 400

31. When this doctrine began to prevail in Chancery, 400, 443

32. To what particular circumstances the first decree of that sort seems to have been owing, 443

33. In what case the contrary was afterwards decreed in the House of Lords, upon parol evidence of the intention of the testator, 400, 442

34. And since that the *Residuum* has been decreed to the executor by Lord Cowper, without the help of such evidence, 400, 401

35. So that the law remains still unsettled in this point, Page 442

36. Where the executors had legacies given them, and the will seemed to be left unfinished for want of the usual conclusion, *In witness whereof I have put my hand and seal*; the Lord Chancellor thought this a strong circumstance to induce a belief, That the surplus was not designed for the executors, 443

37. One was made executor upon a promise, That he would not thereby take any advantage with respect to any part of the estate, but let A. have it. Decreed the executor to be a trustee for A. by virtue of this promise, 516

38. A future interest in a term will go to the executor, 421

39. He is now accountable for the interest of the testator's estate, as well as for the principal, though it was formerly otherwise, 20

Exposition of Words and Sentences.

Courts of justice ought to endeavour to expound in such a manner as may be most proper to bring things to some end, 369

Inde producit sectam, 253

Unable to work, 308

Excommunicated ipso facto, 65, 79

Civiliter mortuus, 360

Commitment by warrant, 429

Depart without convoy, 287

To J. S. and his heirs, 371, &c.

To such daughters as shall be begotten, 397, 398

Then and thenceforth, 31, 73

When C. and his wife should die without issue male, 314

Dying without issue, 403

You may if you please give 1801. to my niece; but I leave it entirely to you,

Page 404, 405

I do hereby revoke that part of my will, wherein I make A. B. and C. three of my trustees,

520

Tenere placita,

126

Cognitio placitorum,

126, 128

Cognitio placitorum, with exclusive words & non alibi,

126

Difference between the words not inclosed and though not inclosed,

280

No difference between under the hand and seal of A. and under the proper hand and seal of A.

291

Acquiescatus,

215

Children,

376

Clausum,

141, 169, 170

Communia,

184, 185

Dimish,

143

Formed action,

140

Hereditament,

236

Imbezil,

150

Inherit,

122

Issue,

183, 184, 376

Jufficiarius

128

Lands,

525, 526, 528

Livelibood,

526

Malitia,

215

Malice implied,

ibid.

Manor,

525

Nec non,

185

Null,

179, 245

Placed,

177

Præfectus,

178

Profits out of land, and profits of land,

94, 96, 121, 241, 401

Property,

143

Purchase,

92, 95, 121, 124, 125,

234, 238, 242

Purchased,

526

Purloin,

150

Remainder,

94

Seisina,

125

Seisitus,

229, 301, &c.

Strata,

382

Successive,

103, 104

Tenentes,

Terra,

Page 185

170, 185, 186

F.

Falle Latin.

The penalty of a bond many times put into false *Latin*, and yet held good,

47

Fee-farm Rent.

A fee-farm rent extendible upon an *Elegit*,

526

Fee-simple.

1. Where a fee-simple will pass without the word *Heirs*,
2. In case of a failure of heirs, it will escheat to the Lord of whom the land is held,

47, 523
411

Feoffment.

1. A feoffment upon an unlawful condition shall be good, when a bond with the same condition would be void,
2. The reason of this difference, *ibid*.

134

Fine.

1. Though a fine presupposes a writ of covenant, yet now the practice is to levy fines without,
2. And though most fines are taken by *Dedimus*, yet they are recorded as taken in court, to prevent questions about captions,
3. A fine levied in vacation-time, may be a fine either of the precedent or subsequent term, at the election of the parties,
4. If there be an intervening term between the chirograph of the fine, and the time when the fine was actually

43

45

44

F

tually levied, Whether this will vacate the fine? *Page 43, 44*

5. A fine may not be vacated but by writ of error only, *43, &c.*
6. Remainder men not intitled to a writ of error to reverse a fine, *44*
7. Fines that are void will make a discontinuance, *179, 245*
8. A fine set aside in Chancery, because levied to other uses than what were intended by marriage articles, *436, 437*

Formedon.

1. A variance from the Register in a *Formedon*, where the variance was immaterial, not regarded, *140*
2. Where this writ will, or will not lie, *362, 367*

Fraud.

A recital in the will of the obligor, of a fraud made use of in extorting a bond, not to be allowed as evidence in equity to overthrow that bond, *439*

Freehold.

Where a man may be amoved from his freehold in his absence, *379, 380*

G.

Gaming.

1. Keeping a gaming-house indictable as a nuisance at common law, *336*
2. Penalty by statute *33 Hen. 8. cap. 49.* forty shillings a day, *336, 337*

Gaol.

1. County gaol as to settlements is considered as situate in every parish of the county, *334*
2. And consequently a bastard child born in the county gaol, is settled

G

by birth in that parish, where the parent was settled when sent to gaol, *Page 334*

Gaoler.

One that is gaoler *de facto*, though not legally so, is bound to take care of the prisoners, *290*

Gavelkind.

1. Where lands are in the nature of gavelkind, all the sons and their representatives make but one heir, *417*
2. All the lands in *Kent* must be presumed to be gavelkind, *ibid.*

Grants, Grantor, Grantee.

1. A grant of the profits of land will even at law, carry the land with it, *94, 121, 287, 365, 401*
2. In grants, the construction of the words shall be governed by the intention of the parties, though it should not suit exactly with the rules of grammar, *185*

Gunner (Of a Ship.)

A gunner, though a warrant officer, is liable to the same punishment in case of mutiny and desertion, as other soldiers, *346*

H.

Heir, or Heirs.

1. How the heir may be said to be *eadem persona cum antecessore*, *421, 425*
2. Where the words of a will are dubious, the heir at law to be favoured, *520*
3. There

31. There must be express words in a will, or a necessary implication to disinherit the heir at law, Page 525

4. If lands be devised to trustees and no use declared, the law will imply it to be to the use of the heir, 520

5. If lands be given to J. S. and his right heirs, the words *right Heirs* are words of limitation and not of purchase, 370

6. Law the same, though an entire estate should intervene between the devise or the grant to J. S. and that to his right heirs, 372

7. As where an estate is limited to the ancestor for term of life, remainder to B. in tail, remainder to the right heirs of the ancestor, 373

8. The heir and not executor shall have the surplus of the testator's real estate devised to be sold for the payment of debts and legacies, 94

9. He may compel a conveyance of the trust estate to himself, upon his own payment of the debts and legacies, 237, 240, 241

10. Or may determine what part of the land, the trustees shall sell for the payment of them, 237

11. The same, if the mortgagee sells, 238

12. One that was knight of the garter, devised all his jewels to his wife; and yet resolved, That his garter and collar of SS should go to the heir, 530

13. Whether the manuscript works of an ancestor shall go to the heir at law, notwithstanding a devise of the residue of the personal estate, 529, 530

14. If the tomb or monument of an ancestor be defaced or destroyed, an action lies for the heir at law, 529

15. Where debt upon a specialty is brought against an heir, he may plead *Riens per descent*, and if it be found against him, the jury shall inquire of the value of the lands descended, by statute 3 & 4 W. & M. c. 14. Page 18, 19

16. But he shall not have leave to plead *Riens per descent* with any other plea, unless he make affidavit That he has *Riens per descent*, 334, 335

17. If one articles to buy land, and dies before conveyance; and the heir may claim the land, and compel the executor to pay for it out of the personal estate, 528

18. If one articles to sell land, and dies before conveyance; the purchase-money shall be paid to the executor, and not to the heir, 469

Highway.

1. If there be but one way to a vill, it shall be deemed a publick way, though not designed for such when it was laid out, 150

2. A highway infinite; having no *Terminus a quo*, nor *Terminus ad quem*, 383

3. A navigable river esteemed a highway, 382

J.

Jeofails.

1. Want of an original is aided after verdict by statute of jeofails, 318

2. But an ill original is not aided, 318, 319

3. Where the issue is material, but larger than needed, it is helped by statute 32 Hen. 8. 19

Imparlance.

A plea to the jurisdiction of the court, not to be received after an imparlance, Page 127

Implication and Intendment.

1. Where it shall supply the want of an averment in a declaration, 331
2. Of devises by implication, see *Devise* 34, 35, 36.
3. Where a statute was held to be repealed by implication, 341

Indictment.

1. The causing a man to be indicted, for what a civil action might have been brought, implies malice, 215
2. What is but evidence cannot be laid in the indictment, 156
3. Same person cannot be both informer and witness,
4. Witnesses produced for the crown in indictments, may be examined upon a *Voyer dire*, as well as in civil actions, 192, &c.
5. Whether using the trade of a badger without licence, be indictable? 148
6. Indictment lies against the husband and wife for keeping a bawdy-house, 63
7. Or a gaming-house, 335
8. That they & *uterque eorum*, kept a gaming-house, well charged; for this is an offence of that nature as might well be committed by both jointly, 336
9. But where an indictment against four persons for using the trade of a plumber, charged, That they four & *uterque eorum*, &c. it was held naught; because the offence not being the use of the trade, but the use of the trade without having served

an apprenticeship, this was an act impossible to be performed otherwise than by each singly, Page 336

10. When the matter charged is an offence at the common law, the concluding *contra formam Statuti*, is no bar to the supporting the indictment by common law, if it be not maintainable by the statute, 336, 337
11. Indictment for a nuisance shall not need to conclude *ad commune nocumentum*, where the nature of the offence imports That it is so, 337
12. Acquittal upon an insufficient indictment, will not intitle a man to the plea of *Auterfoitz* acquitted to another indictment for the same offence, 216

Infant.

1. An infant is incapable of making any contract that is not for his advantage, 139
2. Therefore all bonds entered into by infants void, 85, 139
3. But if an infant and a surety enter into a bond for necessaries for the infant, the bond is good as to the surety, 139
4. And the infant may bind himself by promise, to pay a reasonable price for meat, &c. 29, 85, 139
5. But not for wares, though necessary to the carrying on his trade, 67
6. No action will lie for money lent an infant to buy necessaries, *ibid.*
7. But for money laid out on that account, an action will lie, *ibid.*

Information.

1. An information will lie for not taking the office of a sheriff, 101
2. And

2. And in such case, the not having taken the sacrament within a year, &c. is no defence, *Page 101*

3. In informations in the nature of *Quo Warranto's* against corporation officers, Whether it be necessary for the defendants, in order to shew their title, to prove their qualification by having taken the sacrament, &c. ? *65*

4. In an information *Quo Warranto*, if the defendant sets forth his title with a traverse *absque hoc* that he usurped the office, the traverse is only matter of form, and no material part of the plea, that the crown can take issue upon, *211, 212, 296, &c.*

5. But in an information of intrusion, the crown may take issue upon the usurpation, though a title be set forth, *297*

6. The reason of this difference, *297, 299*

7. In informations upon the game acts, if it be laid generally, That not being qualified according to law, &c. it is well enough, *27*

8. But where the charge enumerates distinctly the several qualifications, omission of one fatal, *26, 27*

Injunction.

Motion in Chancery for a perpetual injunction to stop all farther proceedings at law by ejectment, because the party had already tried his right five several times, denied, *1, &c.*

Innuendo.

1. The office of *Innuendo's* is only to explain what has been already mentioned, *197, 198*
2. And if they are made use of at any time to introduce new matter, they are void, *ibid.*

3. As where an information set forth, That H. swore J. S. was at such a time at *Newnham*, innuendo *Newnham in Devonshire*, innuendo held void, *Page 197*

4. So, burnt my barn, innuendo full of corn, innuendo void, *ibid.*

Inquiry.

1. A writ of inquiry no summons, *82*

2. It is a judicial writ, *270*

3. By the common law, in every action of debt, damages are given, *occasione detentionis debiti*, either by writ of inquiry, or by the court, *277*

4. Motion to set aside a writ of inquiry, for want of the words, *Et habeas ibi hoc breve*, denied, *270*

5. Where writs of inquiry have been held amendable, *68*

Insurance.

1. Definition of an insurance by the civil law, *77*

2. If a ship insured be taken by the enemy, and retaken before it is carried *infra præsidia*, into some place of safety, the insurer not liable, *77, &c.*

3. No difference in this respect, between *interest* or *no interest* in the ship insured, *80.*

4. In policies of insurance, warranted to depart with convoy, has been resolved to import, by the usage of merchants, a *continuance* with that convoy as long as may be, *287*

Interest of Money.

All interest of money reputed unlawful in the time of *Hen. 7.* *278*

Jointenants.

1. Chattels personal cannot remain in jointure after marriage, Page 162
2. But choses in action may, *ibid.*
3. A rule among jointenants, That nothing accrues to the survivor, but what was in jointure at the time of the death of his companion, 163
4. A release is the proper conveyance in law, from one jointenant to another, 444
5. Yet if one grants all his estate to his companion, it shall be understood by operation of law, to be a release, *ibid.*
6. But in such case, if the party should plead *quod concessit*, it would be naught, *ibid.*

Jointure.

1. A jointure made precedent to marriage, will bar a woman of her dower, 455
2. But if a jointure be made after marriage, the wife is at liberty after her husband's death, to wave it and to insist upon dower, 488
3. The same law, if the jointure was not to take effect, in the original creation of it, immediately upon the death of the husband, *ibid.*
4. A woman is esteemed in law as a purchaser of her jointure for a valuable consideration, 125, 475

Issue.

1. The reason of joining issue is, That the parties may come prepared to defend one single point, 299
2. What the laws is as to joining issue in the case of barrettry, *ibid.*
3. Issue may not be joined upon an immaterial part of a plea, 211, 212, 297

4. Ought to be joined upon such a point as may be conclusive, which way so ever it is found, Page 304
5. What is immaterial in the issue, need not be proved, 75
6. Where, by joining issue upon the issue tendered, the plaintiff must lose his debt, 147, 148, 267, 269, 304
7. Issue directed out of Chancery to try the devise of an estate by implication, 418

Issue of the Body.

1. The word *Issue* of a larger signification then *children*, 376
2. It is *Nomen collectivum*, ex vi *Termini*, and takes in the whole generation, 183, 376
3. Used in all acts of parliament, in as comprehensive a sense as *heirs of the body*, 376
4. A man is said to *die without issue* in a legal sense, whenever his issue fails, though this should not happen till some ages after his death, 403
5. But when this legal sense would destroy the intention of a testator, the words *dying without issue* shall be understood in the vulgar acceptance, viz. of having no issue living at the time of his death, *ibid.*
6. *Issue* is ordinarily used in a will as a word of limitation, 184
7. And most commonly in a deed as a word of purchase, *ibid.*
8. Where it was used in a deed as a word of limitation, *ibid.*

Judge, or Judges.

1. Lord Chancellor not concluded by the opinion of the Judges, when sent for to assist at the hearing of a cause, 502
2. But

J

2. But when a case is stated and referred to them for their opinion, their certificate binds, Page 501, 502
3. If a point of law arises at a trial, the Judge is bound to direct the jury accordingly, whether the counsel insist upon it or not, 202
4. A rule made to shew cause why an attachment should not be granted against the Judge of an inferior court, for a contempt of the law of the land in disobeying a toll, 349

Judgment.

1. Two sorts of judgments after verdict, final and interlocutory, 83
2. If the plaintiff dies before judgment by delay of court, judgment may be entered without entering the continuances, 30, 325
3. But the time when in fact the judgment was given must be marked on the roll, that purchasers of land may not be over-reached, 325
4. Where the verdict may be for the plaintiff, and yet judgment must be for the defendant, 147
5. Whether judgment shall be reversed for want of a *Nil capiat per breve*? 225
6. Where, upon writ of error brought, such new judgment shall be given in B. R. as ought to have been given in the court below, 225, 324
7. Of a writ of false judgment, 350
8. In informations and indictments no judgment can be given in the superior courts for any corporal punishment, without appearance (*per Eyre*) 250
9. But (after appearance) though a court in prudence, may not care to give judgment in the absence of the Vol. X.

J

- party, yet no reason but that it may be done. (*per Parker*) Page 344
10. Where judgment was so given, *ibid.*
 11. In real actions upon a second default, judgment shall be given against the defendant to lose his land, 379

Jurisdiction.

It shall never be presumed, that any court has exceeded its own jurisdiction, unless it is apparent that it has done so, 71

Jury and Jurors.

1. In debt upon bond against an heir, if issue be joined upon *Riens per discent*, and the jury find for the plaintiff, but make no inquiry of the value of the lands descended; Whether this omission can be supplied by another jury? 19
2. If a juror that has been once challenged (and the challenge allowed) should afterwards try the cause, it would be error, 390
3. But when a cause was tried by one, that had been before withdrawn from the panel by consent, that the trial might go off *pro defectu juratorum*, it was held no error, 390, 391
4. Nor is such a withdrawing any cause of challenge, 391
5. Where, after a challenge to the array, for the partiality of the sheriff, the same jury was returned by the coroner, and allowed to be well, 351

Jus Possimini.

How to be understood in the civil law, 79

5 M

Justices

J

Justices of Peace.

1. Justices have no power to award giving security for the performance of their orders, until such time as their orders have been contemned, *Page 271*

2. Their jurisdiction extends to the wages of no other servants but those employed in husbandry, 68

3. Yet if they order wages to be paid generally, the court will intend it was for husbandry, and admit of no collateral proof to the contrary, *ibid.*

4. Where, after summons, justices may proceed to conviction, without appearance, 250, 341, &c. 378, &c.

5. But they cannot by warrant compel the party to appear, if such a power be not given them by express words in the statute, 345, 381

6. For this is a power that cannot be given by implication, unless where it is absolutely necessary to the doing of justice, 381

Justification.

1. In action on the case for entering the plaintiff's house and taking his goods, justification in aid of a bailiff who had a writ of execution, held good, though not said to be by his command or desire, 2, 25

2. In trespass for taking the plaintiff's cattle, justification that they were damage-feasant in the defendant's close, sufficient without setting forth a title, 37

3. But it is otherwise, if any place be specially laid down in the declaration, *ibid.*

4. In trespass, justification for a way, That J. S. (the lessor to the defendant) was seised of such a field, and

K

that J. S. and all those whose estate he had, did time out of mind, &c. held well after verdict, though the seisin in fee was not particularly set forth, *Page 228, &c. 300, &c.*

K.

Kalendar.

The kalendar of no authority before the reformation, 105, 106

King.

1. The king can do no wrong, 5

2. He is said to be *occupatus de arduis negotiis Regni*, 123

3. Can make no new laws, being but one branch of the legislative power, 126

4. He is said to have a property in such arts and trades, as were at first introduced by the care of the crown, 106

5. Whether he has any particular power over those trades, where mismanagement would prove more than ordinarily prejudicial to the publick? 105, 106

6. The king has several privileges in pleading above a subject, and what, 200

7. Where there are two obligees, and one grants the bond to the crown, the king may sue alone, 245

8. Whether upon the outlawry of one of the obligees, the whole debt be vested in the crown? 246

King's Bench.

1. This court may exercise whatever authority was lawfully exercised in the Star-Chamber, 187

2. They are placed as guardians over the law of the land, 349

3. And

3. And are invested with a general jurisdiction over inferior courts, Page 349, 350
4. To take care that other courts do not transgress their jurisdiction, 350
5. And likewise that they proceed regularly in such matters as are within their jurisdiction, *ibid.*
6. The power of *B. R.* extends to all inferior magistrates whatsoever, to compel them to do their duty, 48, 60
7. And to provide, That publick offices be discharged by such persons as are duly elected, 54

L.

Law Cases doubted, or denied.

1. 2 *Hen.* 5. (Bond given to forbear the exercise of a trade for a certain time, void) the extrajudicial opinion of a single judge, 85, 137
2. 3 *Levinz* 241. (Contract by Bond for forbearance of a trade void, by *Promise* good) denied to be law, 137, 138
3. *March* 191. *Barrow* and *Wood*, what is there said, That an agreement not to sow one's land is void, is not warranted by the case on which that assertion is founded, 135
4. 2 *Lev.* 228. (That an executor might join in one action, a debt owed him in his own right, and a debt owed him as executor) contradicted by better authorities, 171, 172
5. *Raym.* 135. *Chamberlayne* and *Preseat* (of malicious indictments) denied to be law, 217
6. 1 *Rol. Abr.* 110. That case will not lie upon an insufficient indictment, because conspiracy does not, denied to be law, as built upon a wrong foundation; there being no parity of reason between these different kinds of actions, Page 218
7. 1 *Mod.* 211. (Prohibition to be granted upon a dispute between two Ecclesiastical Courts about *bona notabilia*) a case not much regarded, 272
8. 1 *Cra.* 445. (bad prescription cured by verdict) denied to be law, 300, 301
9. 1 *Lev.* 17. (two obligees, one becomes bankrupt, debt not assignable) doubted; no judgment having been given in the case, 246
10. 1 *Mod. Rep.* *Seymour's* case, what is there said of an almanack's being a copy of the kalendar, contested, 105
11. 1 *Ventris* 191. Statute of limitations not to be taken advantage of without pleading it. The law is now otherwise, 313
12. 21 *Hen.* 7. The interest of the king determined by alienation after outlawry. Not altogether law; for resolved since, That persons outlawed cannot alien after inquisition found, 358, 359
13. 1 *Ventris* 229. *Raym.* 82. *Pollexfen* 106. *Taylor* and *Sayer*, denied to be law, 183
14. *Raymond* 86. *Lee* and *Raynes*, misreported, 251
15. 3 *Lev.* 431. *Loddington* and *Kime*. Wrong reported by *Levinz*, though of counsel in the case, 403
16. A case in *Plow.* 48. *b.* relating to the dodging of a freehold, in part denied to be law, 3 *Co.* 10. *b.* 361

Lease, Lessor, Lessee.

1. A tortious fee-simple sufficient to support a lease, 265
2. Where

2. Where leases are made by tenants for life, that have also a power to grant leases for years, they shall be esteemed to be made by virtue of the power, if they cannot have their full effect otherwise, Page 36
3. If a lease be forfeited for non-payment of rent, yet upon bringing in the arrears with costs, the proceedings in an ejectment shall be stayed, 383
4. But where an affidavit was made, That the lessee was a soldier, and consequently a privileged person, the court ordered he should give security for the future payment of his rent, 383
5. Lessee for life becomes professed, the lessor may enter; but if the lessee be deraigned, he may re-enter 413, 414

Legacy and Legatee.

1. A feme-covert may sue alone for a legacy in the spiritual court, 64
2. Legacy given to a married daughter, to be laid out in what she should think fit in remembrance of the testator, decreed to be accounted for by the husband's executor, as a legacy intended for the separate use of the wife, 531
3. Where a legacy is given to a creditor greater than the debt, it shall be taken as given in satisfaction of the debt, or not, according to the circumstances of the case, 399
4. A legacy of 500*l.* given to a servant-maid for her faithful services, decreed to go in satisfaction of 100*l.* bond due for wages, 399, 400
5. A legacy of 500*l.* given an executrix, decreed her over and above a debt of 300*l.* due to her in the way of trade, upon her submission to have the *Residuum* of the testator's

estate undisposed of by will, divided according to the statute of distributions, Page 398, &c.

6. Where Lord Cowper decreed a legacy, though greater than the debt, to be taken as a gift, and not in satisfaction, 400

Limitation of Actions.

Where an action is brought upon a promise to do an act on a future day, the defendant's plea must not be *Non Assumpsit*, &c. but *Causa Actionis non accrevit infra sex annos*, 104, 205, 206, 294

London and its Customs.

1. Upon the vacancy of an alderman, the wardmote (were formerly) to choose four persons, and court of aldermen to admit which of the four they pleased, 48, 49
2. The court of aldermen, by the custom of the city founded upon the by-law of *Hen. 4.* (were) to admit one of the persons chosen by the wardmote, not one of those returned by the Lord Mayor, 50, 56
3. Of the power exercised by the court of aldermen over these returns, 50, 54, 56, 59, &c.
4. A woman may bar herself by an agreement before marriage with a freeman of *London*, of her right to the customary share of her husband's estate, 455
5. But she is not cut off from her customary right by a jointure in land, unless the jointure be made in bar, 457
6. If the wife of a freeman of *London* be barred by agreement before marriage of her customary part, the freeman may dispose of a moiety of his

his personal estate by will, and the other moiety shall go to the children, *Page 453, &c.*

7. And so in like manner, where the children have been all of them fully advanced, the wife will be intitled by the custom, to a moiety of the personal estate, and the other moiety will be the testamentary part of the freeman, *455*

8. Where the husband shall be considered as dying without a wife, and where as a purchaser of her customary third, *458*

9. No difference in this respect, whether the jointure be of *Land*, or not, *453, &c.*

10. A woman covenants with a freeman of *London* before marriage, to enter into bond to release her customary third (and right of dower) to his executors within two months after his death, in case she should have such an estate in land left her as was then agreed upon. The bond is given, the marriage takes effect, the husband dies and leaves his wife the land articulated for. Decreed the wife should not be permitted to forfeit the penalty of the bond, but should be held to her agreement; and that the husband, as this case was *circumstanced*, should be considered as dying a purchaser of his wife's customary part, *541, &c.*

11. The advancement of a child out of land, no bar of the orphanage part, *457, 460*

12. If the certainty of a child's advancement out of the personal estate, does not appear under the father's hand, it is cut off from claiming a share by the custom, *456, 460*

13. Whatever appears in a marriage settlement to which the father is a

party, appears under the hand of the father, *Page 460*

14. If it appears under the father's hand what things were given a child, the advancement is sufficiently certain, though the value of them be not expressed, *460*

15. And where it appears the child has not been advanced above such a sum, but somewhat less, the incertainty of the advancement may be cured by the child's bringing the whole sum into hotchpot, *461*

16. A freeman of *London* having two daughters, advances one in his lifetime, and it appeared by the marriage settlement to which he was a party, That he gave her for portion 4000 *l.* in money, besides lands and the reversionary interest of a lease of no certain *declared* value. In consideration of which advancement, the daughter executes a release to her father (who was then indebted to her some small matter upon an unadjusted account) of all the claims she might have upon his estate, by the custom of *London*, or otherwise, *save what he should please to give her by his last will.* Decreed that this daughter should not be barred by her advancement, or release, from taking her customary share which had been devised to her, by her father's will, as residuary legatee, *452, &c.*

17. The customs of *London* cannot be judicially taken notice of, any more than any other particular customs, *440*

18. *Ergo*, if a cause be removed out of the city courts by *Habeas corpus*, the custom must be returned, or no *Procedendo* can be granted, *ibid.*

M

M.

Mandamus.

1. The learning of *Mandamus's*, Page 48, &c.
2. Their antiquity, 57
3. Said to be founded upon *Magna Carta*, 53
4. Motion for a *Mandamus* to the Lord Mayor of *London*, to make a new return to the court of aldermen, in the case of an election of an alderman, refused, 48, &c.
5. No precedent in the case of an election, of a *Mandamus* granted to the returning officer, to make a new return, 49, 54
6. For all *Mandamus's* are either to admit persons into their offices, if refused; or to restore them when turned out, 54
7. But a *Mandamus* may be granted to the court of aldermen, if upon a false return of persons not chosen by the wardmore, they refuse to do justice to the parties injur'd, after complaint made, 59
8. Shall not be granted to restore fellows of colleges, and why, 50
9. Sometimes granted where the court has doubted, whether it lay or not, in order to be better considered upon the return, 49, 53, 58, 62
10. If a *Mandamus* be directed to a corporation, and the officer who presides in the corporate assembly, should adjourn it, in order to prevent the making such a return as he dislikes, he would be punishable for a contempt, 56
11. No instance to be produced, where obedience to a *Mandamus* shall expose a man to an action, 51, 61

M

12. What various returns may be made to *Mandamus's* to restore persons to their offices, and all good, Page 174
13. *Non electus* a good return to a *Mandamus*, 101
14. *Non debito modo electus* naught, and why, 101, 102
15. When the return was *Nunquam fuit electus & perfectus*, leave was given to amend the return, by striking out *perfectus*, 102
16. Whether not having taken the sacrament within a year, &c. be a good return? 100, 173, 178
17. Return that contains matters repugnant and contradictory, naught, 107
18. But several causes of removal may be returned, if consistent, 108
19. The reason for not restoring, must be a good reason of removal, 174
20. Whether it must be averred in the return, to have been the cause of removal? 176
21. Whether it must appear upon the return, That the party was summoned before removal? 101, 180
22. What is not answered upon the return, must be looked upon as admitted to be true, 174
23. Where the return was, That they were a corporation such a year and long before, exception taken because they did not intitle themselves by prescription, over-ruled; because it was a failing only in matter of surpluse, 146, 147
24. *Mandamus* to restore *H.* to the office of town-clerk. Return, That he was an officer *annuatim eligibilis*, ill; because the office of town-clerk being in the eye of the law an office for life, the contrary ought to have been shewn upon the return. And though he was *annuatim eligibilis*;

gibilis; yet the same person would continue town-clerk till another was chosen, which did not appear to have been done, Page 146, 147
25. A *Mandamus* may be granted to oblige an inferior court to pay obedience to a toll, 350

Manor.

Whether a right to fairs, or markets, may be appendant to a manor? 260

Marriage Agreement.

1. If a father enters into an agreement upon the marriage of his daughter, to settle such an estate upon her, or to forfeit such a penalty, and he afterwards chooses to forfeit the penalty, it is a debt so entirely due to the husband, that it is not in the power of Chancery to take care of the wife and children, by decreeing a settlement of the penalty, 2511
2. If one covenants by marriage articles to make a settlement, and dies the articles unperformed, Chancery will look upon things in the same light, as if such settlement had been actually made, as the court would have decreed upon the articles, if they had been applied to in the husband's life-time, 437
3. 1400 *l.* is by marriage articles agreed to be laid out in land. Husband dies the agreement unperformed, and devises all his lands unto his nephews. Lord *Harcourt* seemed to think, That since this money ought to have been laid out in land, it should in equity be esteemed land, and (notwithstanding the wife opposed it, who was left executrix) should pass under this devise, subject in the first place to the uses declared in the marriage articles, 39

4. A private agreement on marriage derogatory and contradictory to *that* which is open and publick shall be relieved against, Page 445
5. A father treating a match, obliges his son to enter into bond to pay him after marriage a sum of money, which he said was wanted to make provision for his other children. The bond relieved against, on a bill brought by the son and the wife's father, 448
6. A mother parts with her jointure to enable her son to make a settlement; but at the same time takes a private security from her son, to assign over to her after marriage a leasehold estate of his own. The security set aside in equity, *ibid.*
7. *A.* agrees to settle on his kinsman upon marriage, such an estate in possession, and such in reversion; but obliges the kinsman to enter into a private agreement to redemise, &c. The private agreement set aside in equity, and *A.* forced to account for the meane profits of the estate that had been redeemed, 448
8. Where it was laid down by Lord Chancellor *Cowper*, as a rule in equity, That if a son gives a bond during the marriage treaty, without his father's privity, to refund part of the portion, the bond is void, 447, 448
9. On a treaty of marriage between *A.* and the daughter of *B.* the mother of *A.* surrendered her jointure to enable her son to make a settlement (to which she was one of the parties) proportionable to the fortune *B.* promised to give with his daughter. But at the same time *A.* enters into a bond to *B.* without the privity of his mother, to refund part of the wife's fortune at seven years end. *B*

M

- B. dies in debt before the seven years are expired. Decreed against the creditors, That the bond should be set aside, *Page 445, &c.*
10. Covenant before marriage, to release the wife's guardian within two days after, of all accounts of mesne profits; set aside in equity, 447, 448
11. No difference between such a contract, and a marriage brocage bond; but only of more mischievous consequence, *ibid.*
12. Of marriage brocage agreements, 436, &c.
13. Articles of agreement for a jointure, good against assignees of bankruptcy, 495

Marriage Settlements.

1. Where by marriage articles a settlement is to be made, Chancery will order one not according to the letter but intent of the articles, 437
2. As where by marriage articles lands are agreed to be settled in such a manner, as that the husband would be made tenant in tail, the court will decree the husband shall be made only tenant for life, that he may not have it in his power to bar the issue, and to defeat the intention of the settlement, 436, 437

Master and Servant.

1. Petty treason for a servant to kill master or mistress, 95
2. In case of the battery of a servant, the master and servant may both of them bring their actions for damages, 386
3. And recovery in the one action, may not be pleaded in bar of the other, *ibid.*
4. The act of the servant where he has no authority from his Master,

M

- will not bind him, without his consent, *Page 110*
5. If a servant has orders to sell a horse, and the servant sells him as a good one, no action against the Master, 110
6. If a servant is sent to receive money, and takes a bill in lieu of it, which is not answered, the Master not bound, *ibid.*
7. *Otherwise* where a servant derives a credit from his Master by being used to transact business for him, *ibid.*
8. A servant used to transact affairs of that nature, is sent with a note drawn upon a goldsmith to receive money, and invest it in Exchequer bills; the servant gets B. to give him money for this note, and brings the Exchequer bills to his Master. Two days after, the goldsmith fails; adjudged, the Master should answer the money to B. 110, 111
9. And in this case, it was held, the Master could not recover of his servant; the loss being occasioned by accident, and not folly or negligence, 111
10. If a Master uses to send his servant to buy upon trust, and the servant afterwards when he is sent with money imbezils it, and continues to buy upon trust, the Master is chargeable, *ibid.*
11. And though a servant be dismissed, yet if notice be not given, and he is trusted upon account of the former credit he derived from his Master, his Master will be liable, 110

Maxims of Law and Equity.

1. *Boni est judicis ampliare legem (vel jurisdictionem)* 3

2. Ex-

M

2. *Exceptio probat (vel firmat) regulam in rebus non exceptis*, Page 43, 115, 250, 386, 408
 3. *Nemo debet esse iudex in propria causa*, 48, 49
 4. *Ubi major pars, ibi tota*, 75
 5. *Volenti non fit injuria*, 132
 6. *Quod constat clare non debet verificari*, 150
 7. *Qui per alium facit, per seipsum facit*, 290
 8. *Ex nudo pacto non oritur actio*, (in margine) 295
 9. *Nemo bis pro eodem delicto*, &c. 385
 10. *Debitor non presumitur donare*; a maxim in the civil law, 399
 11. *Non est heres viventis*, 116, 411
 12. *Judicium redditur in invitum*, 236
 13. *Tutissima est custodia quæ sibi creditur*, 121, 365
 14. *Stemma est lex quæ pro religione facit*, 117, 119
 15. *Posteriores leges prioribus derogant*, 118
 16. *Argumentum ab inconvenienti fortissimum in lege*, 297
 17. *Jura naturæ sunt immutabilia; sunt leges legum*, 115, 412
 18. *Nihil accessit ei qui nihil habuit in re unde accresceret jus*, 116
 19. *Verba contra proferentem fortius accipienda sunt*, 303
 20. *Maledicta expositio quæ corrumpit textum*, 410
 21. *Stat pro ratione voluntas*, 471
 22. Wherever there is a wrong, the law must give a remedy, 44
 23. One crime may not defend another, 101
 24. The publick good is ever to be preferred to a private loss, 133, 355
 25. Execution the end and life of the law, 290
- VOL. X.

M

26. He that will have equity must do equity, Page 383, 427

Mayor.

Where a corporation is by charter to consist of Mayor, Recorder, &c. Whether the same person can be both Mayor and Deputy Recorder?

15

Merchants.

Usage of merchants, of what force in law,

287

Merger.

Where a fee-farm rent is purchased in, by the person that is seized in fee of the lands out of which it issues, it is merged in the inheritance,

525, 526

Mesne Profits.

1. An after-born child not intitled to mesne profits, in case of entry by the uncle, 414
2. In case of divorce in the Spiritual Court, a vinculo matrimonii, the husband is not answerable for the mesne profits of his wife's estate, *ibid.*

Misnomer.

1. Of variances or misnomers of corporations, 207
2. That may be a misnomer in pleading, which would be a sufficient *descriptio personæ* to take by, 208

Money.

1. In debt upon bond, the defendant is enabled by the statute for the amendment of the law (4 & 5 Ann. cap. 16.) either to plead payment, or to bring the money into court, 26
2. Where money is devisable by the name of land, 39, 528

5 O

Monks.

M

Monks.

1. A monk incapable at common law of taking land by descent, or purchase, Page 116, 360
2. But upon his deraignment his incapacity is removed, and he shall have the land, notwithstanding the entry of the reversioner, 360, 413, &c.
3. The heir may claim by a monk, 360
4. Though not by an alien, 359
5. Said to be *civiliter mortuus*, or *dead in law*, 124, 360, 413
6. And yet if he was afterwards made a Bishop, he might purchase for the benefit of his church, 124
7. He may be a disseisor, and gain a freehold by committing an act of disseisin, 125

Monopoly.

1. Monopolies odious, 107
2. Against the freedom and birthright of the subject, 133
3. Contrary to *Magna Charta*, 106, 133
4. Yet where the king has a special interest, his grants shall not be judged monopolies, 107
5. What may entitle the King to such an interest, 106, 107

Mortgage, Mortgago, Mortgagor.

1. In case of a common mortgage, as soon as the day of payment is past, the legal estate is absolutely vested in the mortgagee, 424
2. Only a right of redemption remains in equity, *ibid.*

N

N.

Names of Purchase and Dignity.

1. In records and legal proceeding the whole name is to be set forth, Page 284
2. *Ergo* if one that is a Knight and baronet be only stiled Knight, it is a misnomer, 283

Nisi prius.

- A Judge of *Nisi prius* acts rather in a ministerial than judicial capacity, 202

Nolle prosequi.

1. The entering a *Nolle prosequi* upon an information, is no bar to the charge, nor any discharge from a further prosecution, 152, 153
2. If on a recognizance of bail a *Scire facias* be brought for two distinct sums, when it appears by the recognizance that only one is due: Whether this may be cured by entering a *Non pros* as to that sum which is not due? 305

Non suit.

1. Where the plaintiff moved to set aside his own nonsuit; because occasioned by an error of the Judge that tried the cause, who thought the plaintiff had mistaken his action, when it was well brought, 315
2. If the plaintiff in an appeal becomes nonsuit, the court of *B. R.* will nevertheless oblige the party to plead to it, 353
3. For it is a general rule, that whenever the court is possessed of a record, they will proceed upon it, *ibid.*

Notes

Notes promissory.

1. Promissory notes payable to such a one or order, are transferrable by indorsement, by virtue of statute 3 & 4 Ann. cap. 9
2. And the indorsee may maintain an action, *ibid.*

O.

Obligation, Obligor, Obligee.

1. Where the condition is unlawful, the bond is void, 134
2. Conditions against law, of how many kinds, *ibid.*
3. But where-ever the condition may be performed without breach of the law, the bond shall be esteemed good, *ibid.*
4. Of bonds conditioned for the restraint of trade, 27, &c. 85, 86, 130, &c.
5. If a bond be naught *quoad* the obligee, no assignment of his can make it good, 450
6. Where a bond originally void, may be made valid by a subsequent agreement, *ibid.*
7. If a bond be conditioned to do an act at the request of the obligee, and the obligee dies without making any request, the bond is extinguished at law, 519, 520
8. The same where the obligor is made administrator (or executor) to the obligee, *ibid.*
9. Dubious words in the condition of a bond to be understood (ordinarily) in the most favourable sense for the obligor, 154, 223
10. Where the obligor was not permitted to forfeit the penalty of his bond, 454, &c. 507, &c.

11. Where a man was bound in an obligation, not said to whom, and yet this was supplied by the intention, Page 47

12. Bond taken by sheriff for appearance *ad respondend' præfat'* J. S. *de placito transgr. ac etiam billæ* (omitting those words in the writ *ipsius* J. S.) held good, 327, 3 8

13. Of sheriffs bonds, see more under *Sheriff* 1, 4.

14. A. upon marriage, enters into a bond to B. That if he died without issue by his marriage, he would leave 3000 *l.* to one or more of the children of his elder brother, who had married B.'s daughter. A. dies without issue, and gave in his lifetime and by his will together, more than 3000 *l.* to one of those children; but without any declaration, That these gifts were designed in satisfaction of his bond, because as he said (when advised to make such a declaration) the bond had been unjustly extorted from him. In the will there was also a recital of the fraud made use of in obtaining the bond. Decreed the gifts should be taken in satisfaction of the bond; since it sufficiently appeared, the obligor never intended to make those gifts over and above the satisfying his bond, 438, 439

Offices and Officers.

1. If there be a false return made of persons not duly elected into an office, yet when the return is completed by acceptance, there can be no new return, 51
2. Of *de facto* officers and the acts done by them, 66, 290
3. Generally the law is, That acts done by those reputed in authority are good, 290
4. *Non*

4. *Non user* of publick offices that concern the administration of justice, a forfeiture of the office, Page 108
5. *Aliter* in private offices, without request, and some special loss occasioned by such *non user*, *ibid.*
6. Deputation of an office grantable by parol, 74
7. And therefore though it should happen to be granted by writing, yet it may be revoked by parol, *ibid.*
8. Every one not only may, but is by law bound to give his assistance to officers, in the execution of justice, 25
9. Where the question is what the original was in an action, the only way of trial is the certificate of the *Custos Brevium*, or other proper officer, which the court is bound to give credit to, 318, 319
7. If the children be not named, Page 220
8. Order for removal, because likely to become chargeable, is good without an adjudication, 26
9. The parish on which an original order is made, cannot remove till it be reversed, 84
10. And if in fact they do remove, and neglect their appeal to the quarter-sessions, such original order becomes final to all the world, *ibid.*
11. *Similiter* if affirmed upon appeal, 25, 26
12. In orders relating to settlements, the court must take the facts for granted as they are set forth, notwithstanding there appear circumstances sufficient to induce the belief of a fraud, 293, 393

Orders of Justices of Peace.

1. Order for relief of *H.* and four poor children; quashed; because not expressed That *H.* was indigent, 220
2. Order of sessions for the maintenance of a daughter, quashed; because not said she was unable to work, 307
3. Order upon a father-in-law to maintain his son's widow, quashed; because not expressed that he was of sufficient ability, 221
4. Order to pay money for the relief of a poor person until further order, good, 308
5. Order upon the father of a bastard to give security for indemnifying the parish for the future, good, 271
6. Order to remove one with his children, too general, if the ages of the children be not expressed, 26

Ordinary.

1. Before the reformation the book of common prayer was subject to the alteration of the ordinary, 105
2. And every Bishop appointed what feasts should be observed in his own diocese, *ibid.*

Originals.

1. An original is determined by death or outlawry, 369
2. Not to abate by the demise of the crown, by stat. 1 Ann. cap. 8. 258

Overt-Act.

1. Conspiring to levy war generally, is no overt-act to prove the compassing the death of the King, 322
2. *Aliter* if the conspiring to levy war be in order to dethrone him; for this is the civil death of the King, 322

Out.

O

Outlawry.

1. In the case of outlawry for treason or felony, the law accounts the person outlawed guilty of the fact, Page 379, 380
2. Blood is corrupted and estate forfeited, 379
3. On error to reverse outlawry for felony, a *Scire facias* must issue, 188
4. *Otherwise* where the outlawry is for treason, 188, 189
5. The reason of this difference, 188
6. Upon outlawry for lesser crimes, or in personal actions, the party is put out of the protection of the law, 380
7. To be imprisoned if found, *ibid.*
8. Forfeits all his goods and chattels to the King, *ibid.*
9. And likewise the issues and profits of his lands, as long as the outlawry remains in force, 358, 359, 380
10. But alienation before inquisition taken is a bar to the King, 359, 409
11. Persons beyond the seas may not be outlawed, unless in some particular cases especially provided for, 357

P

Papist.

Where the Court of Chancery refused to allow of the receiving the sacrament, as a sufficient proof of the conversion of a Papist, 512, &c.

Pardon.

If an act for a general pardon be not pleaded nor given in evidence (where
VOL. X.

P

the defendant might have done either) Whether the court can judicially take notice of it after a verdict? Page 365

Parliament.

A member of parliament privileged from an arrest for debt, 4

Patent.

1. Where a patent is to be set aside, not upon account of a forfeiture, but because it breaks in upon another's right, no office necessary, 354, 355
2. A grant of the sole use of a trade is (ordinarily) void, 131
3. But where a trade is newly invented, the sole use may be granted for fourteen years, *ibid.*
4. Where a grant to make all playing cards was adjudged to be monopoly, 106
5. Whether a patent for the sole printing of almanacks be good, or not? 105, &c.
6. Where patents for primers, psalters, psalms and almanack have been allowed, 107
7. Patent for sole printing of law books adjudged naught in *B. R.* for the uncertainty of what should be esteemed a law book, 106
8. But this judgment was reversed in the House of Lords, *ibid.*
9. So that this patent, having had the sanction of the House of Lords, is not now to be shaken, 107

Payment and Satisfaction.

1. Acceptance in satisfaction not sufficient, unless it be likewise pleaded to have been given in satisfaction, 224

2. In an action of the case upon several promises, the plea was, That the defendant gave the plaintiff a quantity of, &c. and the plaintiff accepted it in full satisfaction. Question, Whether the word *Satisfaction* should be understood to relate to the giving, as well as to the acceptance? *Page* 224
3. If a different sum be pleaded to have been paid in satisfaction of a bond, from *what* appears upon trial to have been received in satisfaction, this is a variation of the accord, 306, 307
4. *Aliter* where the difference is only in the time of the payment, 307

Perjury.

1. The same evidence not sufficient to convict of perjury, that may determine a case of property, 194
2. Unless the oath be not only false, but wilful and malicious, it is no perjury, 195
3. Therefore a man shall not be convicted of perjury for a mistake, 195
4. As when one swore he read such a deed, and the fact was, he read the counterpart only, this was ruled to be no perjury, *ibid.*
5. Perjury may be committed in matters of circumstance where they are material, *ibid.*

Personal Estate.

Whether the same estate can be considered both as personal and real, in regard of different persons? 94

Physicians.

1. No one may practice physick in *London*, or within seven miles of the town, without a licence from the college of physicians, 353, 354

2. Nor may any, besides graduates of one of the universities, practise in the country, without a licence from the president and three elects, *Page* 354
3. The charter of incorporation, in which these privileges are granted, is confirmed by statute 14 & 15 H. 8. 353

Pleas and Pleadings.

1. A plea to the jurisdiction of the court not to be received after an imparlance, 127
2. Antiently all pleas were *ore tenus* at the bar, 88
3. Pleading is setting forth properly and in due form that fact which in law is a good discharge, 304
4. Such pleas as put circumstances in issue, that do not touch the matter in question, are naught, 307, 308
5. Yet see where the defendant shall take advantage of his own immaterial pleading, 148
6. Pleas are in their own nature entire, and cannot be good as to one part, and bad as to another, 323
7. *Ergo*, if a plea be pleaded to the whole, that goes but to part of the action, the plea is bad for the whole, *ibid.*
8. Defendant may plead as many several matters to any action, with leave of the court, as he shall judge necessary for his defence, 280
9. In pleading words shall be tied to a strict construction according to the rules of grammar, 185
10. And every man's plea shall be taken strongest against himself, 229
11. Only it is a rule in pleading, That nothing needs be averred which appears sufficiently plain without, 331
12. The greatest certainty required in special pleading, 299
13. For-

13. Formerly in actions of debt the whole agreement was used to be set forth, *Page 331*

14. Though now of late a more concise way of pleading has obtained in actions upon the case, *ibid.*

15. Neither was it allowable anciently to plead performance of covenants generally, 228

16. But in Queen Elizabeth's time, general pleadings began to be used to avoid prolixity, *ibid.*

17. Of the difference between pleas of performance and pleas of excuse, 303, &c.

18. Whether it be necessary That every thing that is pleaded by way of excuse should be proved, and make part of the issue? 306, 307

19. Of the difference between pleading a custom and a prescription, 158

20. The form of pleading a prescription, 228, 229

21. Where a seisin in fee was pleaded by the word *seisitus* generally (omitting *de feodo*) and held well after verdict, 228, &c. 300, &c.

22. *Non usurpavit* no good plea to an information *quo Warranto*, 298, 299

23. Though usurious bonds, and those made to sheriffs, or by infants, are all of them void, yet *non est factum* may not be pleaded, 66, 179

24. Where debt is brought upon a bond conditioned for the performance of covenants in such an indenture, the defendant's plea will be naught if it do not set forth the indenture, 329

25. Where money is to be paid in discharge of a debt, *tout temps prist* must be pleaded notwithstanding a tender, 282

26. *Contra* where the action is brought on a bond given in defeasance of a former bond, *ibid.*

27. Though there be several executors, yet the plea of any one of them shall bind the estate of the testator, *Page 324*

28. How the defendant should conclude his plea where there is neither writ nor bill, but the declaration is the first step in the cause, 211

29. The reason why most commonly the plaintiff concludes one way to the country, and the defendant another, 167

30. A special plea may not be set aside by a general replication, 299

Pone.

A cause may be removed out of the county court into the court of C. B. by a *pone*, 349

Poor, Poor's Rates, Poor's Settlements.

1. A poor's rate may not be made to reimburse an overseer of a former year, 104

2. Notice in writing left with the overseers of the poor, of coming to live in the parish, necessary to a settlement, by statute 1 Jac. 2. cap. 17. 14

3. Payment of taxes and exercising of offices adjudged equivalent to such notice, upon the equity of the act, before the statute 3 & 4 W. & M. 14

4. A warden of a borough adjudged to be settled in the parish where he lived during the exercise of his office, though not chosen by the parish, 13, &c.

5. So exercising the office of a scavenger shall gain a settlement, 15

6. And yet payment of a scavenger's rate, because a ward-rate, was held to

- to be no settlement within statute 3
 4 *W. & M.* Page 14
7. An apprentice is settled in the parish where he serves, though not bound there, 279
 8. The same whether his Master be settled there or not, *ibid.*
 9. Unless the Master be a certificate man, *ibid.*
 10. In which case the servant can gain no settlement, without his Master do, *ibid.*
 11. Hiring for a year and service accordingly, makes a settlement, 15
 12. But where service was three weeks short of the year, adjudged no settlement, 261
 13. And *vice versa*, where the hiring was for less than a year, though but for a few days less, yet it was held to be no settlement, notwithstanding actual service for a whole year, 293, 392
 14. Service for a year and hiring for a year, though the whole year's service be not subsequent to that hiring, is a settlement, 287, 390, 392
 15. Provided the service under such hiring be not less than forty days, 287
 16. Where a person was hired for eleven months, by the same Master, from year to year, with only a week's distance between each hiring, the court was divided, 392, 393
 17. If a man takes one entire tenement of the value of 10*l.* *per Ann.* though part of the tenement should lie in another parish, yet he is settled where the house is, 389
 18. But if one takes several distinct tenements in several parishes, and each of them is under the value of 10*l.* *per Ann.* though they amount to more in the whole, yet he gains no settlement any where, 390
 19. If a person has a right of settlement in several parishes, it is at his election in which place he will settle himself, and the Justices may not remove him from the place where he lives to any other, Page 388
 20. Children are supposed to be settled in the same place with their father, except the contrary appears, 272
 21. A person settled in an extra-parochial place cannot be sent thither, if there be no officers to receive him, 81
 22. Neither can he be sent to the parish, where he was last settled, before he removed to such extra-parochial place, *ibid.*
 23. So that *this* being *Casus omissus*, the parish where he becomes chargeable, seems without remedy, *ibid.*
 24. A certificate concludes the parish that gives it, as to all the world, 9
 25. A certificate man adjudged to gain a settlement by the descent of a copyhold upon his wife, though of no greater value than 20*s.* *per Ann.* 430, 431
- Popery.**
- Is a conspiracy against the state as well as religion, 117
- Portions or Provisions for Children.**
1. By a deed of settlement made after marriage, a sum of money is lodged in trustees for making a provision for such daughters as shall be begotten of that marriage. Decreed those words had relation to all the daughters begotten of that marriage, as well before the settlement as afterwards, 397, 398
 2. By a marriage settlement, a term is created for making provision for younger

younger children. In case of both sons and daughters 1000 l. is to be paid to each of the daughters at 21 or marriage; in case of no son and but one daughter, she is to have 5000 l. but in case of no son and more daughters, then 8000 l. to go equally between them, and these sums to be raised out of the rents and profits as soon as they conveniently could. The father dies without issue male, leaving three daughters. Decreed the 8000 l. should be raised by sale, and that interest should be allowed from the time of the father's death, Page 401, 402

3. By marriage settlement a power is lodged in trustees to raise 3000 l. for a daughter, payable at 21 or marriage, when C. and his wife should die without issue male; and in the mean time 100 l. per Ann. to be paid her for her maintenance. Decreed the 3000 l. not to be raised till after the death of both parents; but the 100 l. per Ann. for maintenance to be paid from the time of the daughter's marriage, or her attaining the age of twenty-one, 314, 315

4. Land settled upon husband and wife for their lives, and after the death of the longest liver, remainder to trustees for the term, of 500 years, for raising after the commencement of the term, a sum of 3000 l. payable to daughters at 21 or marriage. Husband dies, leaving only one daughter, who marries in the life-time of the mother. Decreed the 3000 l. not to be raised during the life of the mother, by reason of those words, *After the commencement of the term*; and yet such a present right to be vested in the daughter upon her marriage,

as should go to executors, &c. Page 433. &c.

5. The selling of future terms during the life of both or either of the parents, not much approved of, by Lord Chancellor *Parker*; and what, was it *res integra*, he should not at any time willingly admit of, 434
6. If in a marriage settlement upon one child, there are provisions inserted for other children; such provisions shall never be looked upon as fraudulent, and set aside as such in favour of creditors, 538

Possession.

Possession to be favoured, 415

Possibility.

1. Descendible to the heir, 421
2. If husband and wife be tenants in special tail, and the husband only levies a fine, the wife's estate-tail is turned into a possibility, 412, 413
3. But if the wife survives and enters after the death of her husband, her entry (in case the remainder be to a stranger) will turn the estate of the devisee into a possibility, *ibid.*

Powers, &c.

1. A man devises lands to his wife for life, and then to be disposed of at her pleasure to some one of his children, the wife conveys the land in tail by lease and release and fine levied, and the power was adjudged to be well executed, 31, 72, 73
2. This power not suspended by the wife's second marriage, 31
3. Where one that was tenant for life, with a power of settling upon a wife, executed this power by lease and release, it was held well per *Holt*, 31

4. Of the construction of powers to charge estates, &c. Page 466, &c.
5. Reasons given why they ought to receive a large and favourable interpretation, 446, 475
6. Where the intention of the party plainly appears, Want of circumstances in the execution of a power may be aided by equity, 467, 477
7. For circumstances are annexed to powers only to prevent frauds, 468 477
8. Where a power of charging lands for younger children in writing, attested by three witnesses, was executed in a writing only attested by two, and yet decreed to be made good, 467
9. Where again a power of charging lands by deed or will under hand and seal, was executed by will without a seal, and yet made good, *ibid.*
10. One having a power to limit a jointure of 1000 l. per Ann. covenants upon marriage to settle 1000 l. per Ann. The conveyance is made according to a particular of that supposed value, but what was afterwards found to be no more than 600 l. per Ann. Decreed the jointure should be made up 1000 l. by the remainder man, 479
11. Tenant for life, with power of settling 500 l. per Ann. out of such and such lands, covenants upon marriage for himself and his heirs, &c. That he or his heirs would in pursuance of this power, or otherwise, settle 500 l. per Ann. After the marriage he directs a settlement to be drawn of such lands as were comprized within the power, but dies before it is executed. Question, Whether the remainder man should be bound by this intended convey-

ance, or whether the wife should have satisfaction made her out of the personal estate. Decreed upon a second hearing with the assistance of the Judges, That the lands should be settled, Page 463, &c.

12. Yet when one that had a power to make leases reserving the ancient rent, in the execution of the power reserved the ancient rent without saying what that was, the Court of Chancery refused to interpose to the prejudice of the remainder man, 473

Precedents.

1. In what cases precedents are of little or no authority, 197, 269
2. Where a material variance from the Register was allowed by reason of precedents, 140
3. Precedents cannot be departed from without the greatest danger to the estates and properties of the subject, 375
4. For to pass a judgment contrary to precedents, is in effect to shake the law where it is firmly established, *ibid.*
5. So that if the course of precedents be clear, their authority is too great to be controlled, though the reasons appear to be naught upon which they were established, *ibid.*

Prescription.

1. A prescription that is naught at law cannot be cured by verdict, 300, 301
2. Otherwise if it be only defectively set forth, 302
3. No less estate than a feisin in fee will support a prescription, 229, 300
4. Prescription to common may not be pleaded generally *Divers Freeholders,*

3. *Et.* but must be confined to some certain particular tenements, Page 158

5. But by way of custom, this general method of pleading will be good, *ibid.*

6. Prescription laid, That the defendant and all the occupiers, &c. too general, 301

Presentation.

1. Though the presentation be without title, yet if institution and induction follow, the party has such a possessory right, as he shall not lose without a *Quare impedit*, 174

2. Otherwise in case of a simoniacal presentation, where all is made void by statute, in the same manner as if the incumbent was naturally dead, 176, 177, 407

Printing.

1. Printing said to have been more under the power of the crown, from the time it was first invented than any other art whatever, 106

2. Because an art introduced by the crown, *ibid.*

3. And because of the great inconvenience that may redound to the publick by the mismanagement of it, *ibid.*

Proctor.

Whether a proctor may sue for fees in the spiritual Court? 202, &c.

Prohibition.

1. Though the wife be sued singly in the spiritual court; yet both husband and wife must be joined in paying a prohibition, 387

2. Where motion for a prohibition is founded upon matter of suggestion only, affidavit is necessary, *ibid.*

3. Prohibition grantable *pro defectu Triationis*, by reason of the different rules observed in the spiritual and common law, Page 272, 441

4. Lies to a suit for taking away the goods of an intestate from the administrator, because an action of trover may be brought for them, 21

5. Lies to a suit for fees in the court of admiralty, 264

6. Or in the court of honour, *ibid.*

7. Whether it will lie to a suit for fees in the spiritual court, resolutions both ways, 263

8. But Lord Chief Justice Holt was of opinion, That a prohibition ought to be granted, because otherwise the statute of limitations might be avoided, 263

9. A prohibition may be granted after sentence, where it appears upon the face of the libel, that the cause was not of spiritual cognizance, 439

10. *Aliter* in matters that belong to the spiritual court, though for particular reasons triable at the common law too, 439, 440

11. Whether a prohibition will lie after sentence, in a suit for *Easter* offerings, where no defence was made, 440, 441

12. Where the spiritual court tried a prescription to a right of choosing church-wardens, a prohibition was denied after sentence, 112

13. Will not lie after sentence for calling a woman *Whore*, though the words were spoken in a place where they are punishable by a particular custom, 439

14. A recovery in damages no cause of prohibition in a suit for adultery, 386

15. Will not lie to stop a feme-covert's suing singly upon the the statute of distributions, 62

16. If

16. If the wife be sued singly in the spiritual court where the husband ought to have been joined, this is no cause for a prohibition, though it may be a good one for an appeal, Page 264

17. In a suit in the spiritual court for a church-rate, where the parishioners were taxed ten times the value of an ancient rate without saying what, a prohibition was moved for upon account of the uncertainty of the rate, but denied, 13

18. Motion for a prohibition upon a dispute between a peculiar and the prerogative court, whether *Bona notabilia* or not. Refused to be granted, 272

19. Where the principal belongs to the spiritual court, the accessory shall be tried there too, 386

Property.

1. When the property of goods taken by an enemy is altered; and when not, 78, &c.
2. By the laws of France and Spain, a continuance in the possession of the enemy for 24 hours, is an alteration of the property, 78
3. The same by the old English law, according to *Albericus Gentilis*, *ibid.*
4. But now neither our law, nor the *Jus Gentium* allow the possession of the enemy to introduce any alteration of property, before such time as they are carried *infra præsidia*, 79, 80
5. Ship taken by the French in 1691, of Yarmouth, carried to North-bergen, then sold to A. and afterwards to B. B. sends her to the West-Indies, afterwards to France, and in 1695 to England; where she being retaken, it was resolved

by the Court of the Admiralty, That the property had not been altered, Page 79

6. Where acceptance is not necessary to an alteration of property, 189, 190, 432

Purchase and Purchaser.

1. Legal import of the word *Purchase*, 92, 483
2. Where and how far persons disabled at the common law from taking by descent, have yet a capacity left in them of taking by purchase, 359, 360
3. Difference between taking by limitation and taking by purchase, 377

Q

Quare Impedit.

1. The old writ of *Quare Impedit* is now out of use, and what is at present called by that name is the writ of *Quod permittat*, 311
2. In a *Quare Impedit* plaintiff and defendant are actors one against another, if they be both out of possession, 309
3. But if the defendant be in possession, he is not obliged to make a title, or become actor, *ibid.*
4. How the vacancy ought to be pleaded, 310, 311
5. Where it is ill, exception comes too late after the vacancy had been admitted by pleading a presentment under it, 311
6. See a mistake in pleading the seisin, 310
7. Where in a *Quare Impedit* by the Chancellor and University, the conviction of a Popish recusant was held

held to be sufficiently pleaded without the words *ideo convictus est*,
Page 209

8. In a *Quare Impedit* the *Venire* must be returnable upon one of the common return days, 310

9. The omission *inde producti sectam* may excuse the defendant from answering, 310, 311

10. But it is not assignable for error after he has answered, 311

11. A writ of error upon a *Quare Impedit* pending a year, the value of the living for a year was given in damages, 274

R.

Real Estate.

What constitutes the proper difference between real and personal estates, 237

Recognizance.

1. Release of a recognizance *ante emanationem Scire facias* an immaterial plea, 87

2. A recognizance *ad respondend.* generally, extends not only to the crime for which the party was committed, but to all such crimes as he shall be charged with, 152, 153

3. If the party do not appear, be the cause of his absence what it will, the recognizance is forfeited, 153

4. Judges of oyer and terminer, the proper judges whether recognizances ought to be estreated, or spared, 278

5. Though a recognizance for appearance has been estreated, yet if the party appears and takes his trial next sessions after, it may be compounded in the Court of Exchequer for a very small matter, *ibid.*

Release.

1. A release of all demands given by the husband, will release a debt owing to the wife before coverture, for the husband only can demand it, Page 165

2. *Aliter* if he gave a release of all actions, *ibid.*

3. A man may release a right which he cannot assign, 423, 425

Relief in Equity.

1. If such and such particular lands are agreed by marriage articles to be settled upon the heirs of the marriage, and are afterwards (no settlement being made) conveyed to different uses, the descent of other lands of greater value than those comprized in the articles, shall not bar the heir from being relieved against this conveyance, 436, &c.

2. If the articles had been only to settle lands generally, *Quare*, 438

3. If an executor applies part of the personal estate to pay off a mortgage debt, and by that means the assets prove insufficient to discharge the debts owing by simple contract, the creditors shall be relieved against the heir, 426

4. A note is given to a maid servant for a sum of money, in consideration of her endeavours to procure a marriage. The maid marries one who had no notice of the consideration of the note, but was induced to have her upon the account of this money; and yet the note was relieved against, 448

5. Relief not to be had, where it cannot be given without over-ruling the maxims of the common law, 1

Remainder.

1. It is a principle of law, That a remainder must vest at the determination of the particular estate, or sooner. *Page 362*
2. And therefore before a late act of parliament, it was customary to vest the estate in trustees for the preservation of contingent remainders, *ibid.*

Rent.

1. A rent created *de novo* (but not a rent *in esse*) may be granted with a condition to cease during the minority of the heir, *366*
2. And in case of such a grant, the wife of the grantee shall recover in a writ of dower with a *Cesset Executio* during the minority of the heir, *367*
3. An action of debt is brought for 15*l.* rent. The declaration is upon two demises for 22*l.* held ill, and not to be helped by a *Remittitur*, *69, 70*

Replevin.

1. A possessory right only, without the property, not sufficient to maintain a replevin, *25*

Replication.

1. If a vicious replication be made to an insufficient bar, Whether the plaintiff may have judgment? *205, 206*
2. In debt upon bond, plaintiff shall not vary the day in his replication from *that* alledged in narr. But otherwise in trespass, *252*
3. Not necessary to set forth in replication what is admitted by the defendant's plea, *257*
4. A replication that puts in issue only the immaterial part of the defen-

endant's plea is naught; *Page 211,*

5. Though the defendant's plea appear to be false of his own shewing, yet if such matter be pleaded in the replication as supposes and admits it for true, the plaintiff is not at liberty to take exception to it afterwards upon a demurrer to the rejoinder, *265*

Return of Writs.

1. The returning of a writ is a ministerial and not a judicial act, *309*
2. No officer but a sheriff, and that by the statute of York, obliged to set his name to the return of a writ, *308*
3. If the return be not questioned within the first term after it comes into court, it shall be taken for granted that it was made by a proper officer, *ibid.*
4. If writs issue out of another court returnable in B. R. the court may compel the proper officer to make the return, *333*
5. Between the *Teste* and the return of all summons and attachments, fifteen days necessary by common law, as well as by statute, *82*
6. If no return be made to a writ of error, there goes an *Alias*, then a *Pluries*, and then an attachment against the Chief Justice, *284*
7. Return of a writ of error, out of Ireland by Richard Cox, Mil' (omitting *Capital Justic' infranominat'*) and held well by reason of precedents, *308, 311*
8. Where the returns to writs of error have been only *Record' & process. de quibus, &c. sequuntur in hac verba*, without any *Respons'* at all, *308*
9. In

9. In case of the removal of orders or convictions by *Certiorari*, entire credit must be given to the returns made by the Justices, *Page* 293, 382, 393
 10. But if the Justices make a false return, whereby Justice and the parties are abused, they may be punished, 382

Revocation.

1. If uses be revocable by writing under the proper hand and seal of *A.* the revocation is a personal act, 291
2. If a power of revocation by writing have a clause, *That then and thenceforth* the uses shall be revoked, yet the revocation may be by will, though *that* takes no effect till death, 73
3. Cases relating to powers of revocation not much favoured, 478
4. One makes a voluntary settlement with power of revocation on tender of a guinea, and afterwards makes another voluntary settlement of the same lands to different uses. The tender of the guinea not being proved, the Court of Chancery refused to set aside the first settlement, 476
5. A woman makes a settlement in favour of her husband with a power of revocation, and afterwards sends letters of instructions to have a deed prepared in pursuance of this power, for revoking the settlement, but dies before the deed is executed. The settlement not revoked, 473
6. But had the wife been hindered from executing her power by any act of the husband, *this* would have been a sufficient ground for relief in equity, *ibid.*

7. Want of formalities, and circumstances in the case of a revocation, (when omitted through necessity) may be supplied by equity, *Page* 468

Rights and Remedies.

1. In what case there seems to be no remedy, 81
2. In some case the law gives a double remedy for the same right, 59
3. If the covenants be mutual, the remedies ought to be so too, 505

Rules of Court.

1. If a cause has not been at all prosecuted during four terms, process cannot be revived without a term's notice, 40
2. And note, a *Term's Notice* is so to be understood that a whole term must intervene between notice and trial, *ibid.*
3. When and where a copy of a rule of court shall be allowed as evidence, 109
4. The method of making a submission to an arbitration a rule of court, 332

Rules of Law and Equity.

1. Rules of law the boundaries and fences of property, 476
2. Every one is presumed to know the law, *ibid.*
3. No limiting a fee upon a fee by the common law, 422, 423
4. A freehold can never be in suspension or abeyance, save in cases of absolute necessity, 361, 364
5. *In dubio hæc legis constructio quam verba ostendunt*, a rule both at civil and common law, 117, 410
6. Things that ought to be done, are in equity considered in the same light

light as if they were done, Page

240, 526

7. It is a rule in equity, That he who has law and equity both on his side, shall be preferred to one who has an equitable right only, 494

S.

Scire facias.

1. One may plead in bar or abatement to a *Scire facias*, as well as to other actions, 112
2. To a *Scire facias* the plea in bar is concluded with an *Executio non*, as in other cases by an *Actio non*, *ibid.*
3. Where a *Scire facias* is a judicial writ, it will not abate for want of form, 270, 271
4. *Si sibi viderit expedire* omitted in a *Scire facias*, and yet held good, *ibid.*
5. A *Scire facias* on recognizance of bail is a judicial writ, 306
6. Not necessary to set forth in a *Scire facias* against bail, the awarding of a *Capias* against the principal, 257
7. Motion in arrest of judgment upon divers exceptions to a *Scire facias* brought for the repeal of a patent for fairs, 258, &c. 354, 355
8. In case a patent is prejudicial to the subject, a *Scire facias* held to be a writ of right, 260, 354
9. At what distances both of time and place, the holding of fairs and markets may be granted without prejudice to each other, the jury the proper judges, 355
10. Where a *Scire facias* is an original writ (as here it is) it will not abate upon the demise of the crown, 258, 259, 355

Sheriff.

1. In what case a bond taken by the sheriff to indemnify him in the execution of a writ has been held good, Page 53
2. By the common law he is to take no fees for doing his office, 139
3. But now he has fees given him by statute, *ibid.*
4. Yet bonds taken for execution fees are void; and why, 85, 86, 139
5. Promise for the payment of them, good, 85
6. In an information against D. for exercising the office of alderman of London, not being duly chosen, challenge to the array by the crown, because one of the sheriffs was one of the persons returned to the court of alderman, allowed, 198, 199
7. And the question to be tried being, Whether the right of election lay in the freemen of the ward only, or in all that paid scot and lot; it was afterwards allowed for good cause of challenge to the array, because returned by a sheriff that was concerned in interest as a freeman of the city, 199

Soldier.

1. A soldier is privileged from being held to special bail by act of parliament, 4, 111
2. This privilege extends to troopers, and to the gunners of the King's ships though warrant officers, 346, 347
3. Among soldiers, possession of goods for a certain time, after taking from the enemy, alters the property, 79
4. What the laws determine in this point, see *Property*.

Specifick

Specifick Performance.

1. A sheriff that refuses to assign a bail bond, is not only liable to an action at law, but may be compelled in Chancery to a specifick performance, *Page 289*
 2. In case of a contract for lands, a bill lies in equity against the vendor for specifick performance, *527*
 3. And should the vendor sell and convey the land afterwards to another, having notice of the precedent contract, the second vendee may in such case be compelled to a specifick performance, *527, 528*
 4. The vendor may bring his bill for a specifick performance, as well as the vendee, *505*
 5. Whether it be consistent with the rules of equity to decree a performance in *Specie* of a purchase of lands at a very extravagant and unreasonable price? *503, &c.*
 6. Where it was determined in the Court of Exchequer to enforce a specifick performance of such contracts, if the price was reasonable at the time of the contract, how disproportionable soever after accidents might make it, *504*
 7. Bill brought by the vendor for a specifick performance of articles for the purchase of an estate at 40 years purchase, dismissed with costs, because the title was not laid before the vendee's counsel within the time limited, *503, &c.*
 8. Where the vendor had covenanted to convey freehold, and one acre or two proved copyhold, the court refused to decree a specifick performance of an extravagant bargain, notwithstanding the vendor offered to procure an enfranchisement of the
- VOL. X.

- copyhold, or to make any compensation in the price, *Page 504*
9. By marriage articles land is agreed to be settled in special tail, remainder to a fourth son of the husband's father. The estate tail being spent, and no settlement made, a bill is brought by the heir of the remainder-man against the heir of the husband, for a specifick performance of the articles. And it appearing in the cause, that the husband's father had a power of charging the estate with the payment of 1300 *l.* which it was not probable he would have departed from, but in consideration of his son's giving his consent to that part of the settlement under which the plaintiff claimed, a conveyance was decreed accordingly, *533*
 10. *A.* enters into a treaty of marriage for his daughter with *B.* and gives him a bond to settle, &c. one third of whatever lands should come to him by the death of his father. The obligor not permitted to forfeit the penalty of his bond; but the bond taken as evidence of an agreement to settle, &c. and a specifick performance decreed, *507, &c.*
 11. *A.* seised of a copyhold estate attempts to surrender it to the use of his will, with a resolution to devise it to *B.* his sister's son; but a surrender not being practicable by reason of some accidents, he prevails with his sister, who was heir at law, to give a bond to her son, conditioned to surrender at his request, upon the payment of 200 *l.* *A.* dies, *B.* receives the rents and profits some time, and then dies intestate, leaving only two sisters. The mother administers, and having procured herself to be admitted tenant of the copyhold, &c. devises it by will to
- 5 S one

one of her daughters and sister of *B.* The other brings her bill against the devisee for a specifick performance of the condition of the bond, by which she would be entitled to a moiety of the land. Decreed that the mother should be considered as a trustee for *B.* and that a surrender and conveyance should be made accordingly upon the payment of the 200 *l.* with interest from the death of *A.* Page 515, &c.

Statutes in general.

1. It is the proper business of acts of parliament to make alterations in the common law, 411
2. The judges have authority to mould statute laws according to reason and best convenience, to the truest and best use, 412
3. Statutes ought not to be so expounded, as to elude the force of them, 344
4. The intention of the act should be supported, 239
5. And where the words are doubtful, that exposition ought to prevail, which will render the act the most effectual, 343, 346
6. Care must be taken to put such a construction upon the whole as may make the parts consistent with each other, 239, 483
7. The words of an act of parliament are to be understood in a legal sense, unless the subject matter of the act does apparently hinder it, 234
8. The best way of interpreting statutes, is by the rules of common law in like cases, as far as is consistent with preserving the end and design of the act, 245, 345, 359, 360, 379, 395, 411
9. Statutes against natural equity are void, 115

10. Statutes made for the advancement of religion, must receive as strong an interpretation for the attainment of that end as possible, Page 117, 356, 410

11. Penal statutes commonly receive the most mild and favourable interpretation, 93

12. Yet penal statutes that are remedial laws, or designed for the advancement of the publick good, may be extended by equity, 95, 117, 242, 281, 282, 356, 410

13. Savings or exceptions in statutes, must not be so expounded as quite to overthrow the purview, 115, 408

14. A general subsequent clause may be restrained by a preceding one, 242, 485

15. Whatever is a necessary and unavoidable consequence of an act of parliament, is to be esteemed a part of the act, as much if it was inserted *totidem verbis*, 410, 411

16. Upon the repeal of a statute that repealed a former statute, the first statute, is revived again, 412

17. Repeals by implication not to be allowed of, where it is possible to make statutes consistent, 118

18. And where it is not, the latter statute should be so interpreted as to repeal as little as possible of a precedent one, *ibid.*

19. Where a statute gives a penalty, and does not say to whom, *there* (commonly) the crown shall have it, 121, 358, 364, 409

20. Yet where a penalty is given by way of damage, *there* (though not said to whom) the penalty shall follow the loss, 121

21. In penal laws, computation of time is generally taken inclusively, 212

22. Where

22. Where the statute makes the offence, no other remedy can be pursued but what the statute gives; otherwise of a crime indictable before,

Page 337

23. In summary proceedings upon statutes, Whether it be necessary to observe the rules of common law, or only those of natural justice?

341, &c.

24. When matters of record, or specialties entered into with ceremony are made void by statute, the meaning (commonly) is no more than that they may be avoided in a proper manner; for acts of parliament do always suppose necessary incidents,

180

25. Otherwise when the act relates to a matter in pais,

ibid.

Statutes particular explained.

Stat. 9 Hen. 3.

Magna Charta.

1. Mandamus's founded upon Magna Charta, cap. 29.

53

2. Liberty of the subject precarious before this statute,

106

3. Monopolies said to be contrary to Magna Charta, 2 Inst. 47.

106,

133

4. This statute does not annul the monopolies that were then in being, but provides against new ones,

106

Stat. of Marl. 23. 52 Hen. 3.

1. Prohibits farmers to make waste,

282

2. Expounded by equity, though a penal law,

ibid.

3. Farmers extends to strangers,

ibid.

4. Making Waste to waste by neglect,

ibid.

Stat. of Gloucester, 7 Ed. 1.

De Religiosis.

1. Disables the church from taking lands by any manner of conveyance,

Page 236

2. Yet if the church brought their action for such lands as they desired to purchase, and judgment was suffered to go by default, this was held to be out of the statute,

ibid.

Stat. Westm. 2. cap. 1. 13 Ed. 1.

De Donis.

1. Designed to secure the estate of the ancestor to the issue, 375, 469,

476, 478

2. Declares a fine levied of intailed lands to be *ipso jure null*, 43, 179

245

3. Yet it has been interpreted to mean voidable only,

43

4. So that such a fine would make a discontinuance,

179; 245

5. Where this statute has been expounded in several instances, by the rules of common law,

360

6. It is now much altered by subsequent statutes, and judgments that have been given in the courts of law,

375

Chap. 18. Execution.

1. The sheriff to extend a moiety of the debtor's land upon an *Elegit*,

526

2. A fee-farm rent may be extended,

ibid.

Chap. 46. Approvements.

1. Where fences made upon just improvement are thrown down, this statute gives a remedy against the adjoining

adjoining towns, if they do not indict such as are guilty of the fact,

Page 157

2. But an action will not lie upon this statute before a reasonable time has been allowed for indicting the offenders, *ibid.*

3. According to Lord Coke (2 Inst. 406.) a year and a day should be allowed.

4. No precedent of any less time, *ibid.*

5. This statute does not extend to every Lord (of waste) but to such only as have a right to approve, 158

Stat. 28 Ed. 1. cap. 15.

[Articuli Super Chartas.

1. Declaratory of the common law, 82

2. Requires fifteen days between the *Teste* and the return of all summons and attachments, *ibid.*

Stat. of York. 12 Ed. 2. cap. 5.

Sheriffs.

- To set their names to their returns, 308

Stat. 25 Ed. 3. Stat. 5. cap. 2.

Treason.

1. Petty treason for a servant to kill a Master, 95

2. Extended by equity to a mistress, *ibid.*

Stat. 1 Rich. 2. cap. 12.

Gaolers.

1. Gives an action of escape against the warden of the *Fleet*, 95

2. Extended by equity to all gaolers, *ibid.*

Stat. 5 Hen. 4. cap. 14.

Fines.

To be enrolled,

Page 42

Stat. 23 Hen. 6. cap. 10.

Sheriffs.

1. Compellable to take bail, 288

2. Yet doubted formerly if a sheriff returned a *Cepi Corpus* (as he must notwithstanding this statute) and had not the body in court at the day of the return, whether he was not liable to an action, 288

3. But the law now settled that he is not liable, according to a resolution 21 & 22 Car. 2. *ibid.*

4. Bonds taken by the sheriff otherwise than for appearance only, void, 327

5. Where these bonds for appearance have been held void for defects in the form of the condition; and where not, 327, 328

6. Neither the writ, nor any part of it, need be inserted in the condition of the bond, 328

7. Bond conditioned *ad respondendum* *præfat. J. R. de placito transgressionis, &c. ac etiam billæ*, omitting *ipſus J. R.* and yet held good, 327

328

Stat. 3 Hen. 7. cap. 10.

Error.

1. Designed to restrain the abuse of writs of error brought only for delay, 275

2. Gives costs and damages to be assessed at the discretion of the justices, before whom such writs are sued, 274, &c.

3. Whether

3. Whether the statute ought to receive a strict or liberal interpretation?

Page 275, 277

4. Though the words of the statute are general, yet some cases resolved out of it, 276, 277

5. Motion for allowing interest by way of damages (from the time of the first judgment) upon writs of error brought into B. R. denied, 274, &c.

Stat. 14 & 15 Hen. 8. cap. 5.

Physicians.

1. Confirms the charter for incorporating the College of Physicians, 353
2. Penned in very strong terms, *ibid.*
3. What privileges are granted by the charter, see *Physicians*.

Stat. 21 Hen. 8. cap. 13.

Pluralities, Page 412.

Stat. 24 Hen. 8. cap. 12.

Appeals.

In causes ecclesiastical must be brought within fifteen days after sentence,

386

Stat. 26 Hen. 8. cap. 13.

Treason.

1. Gives entailed lands to the crown in case of treason, which were before preserved to the children, 121
2. Therefore a tenant in tail may be attainted of treason without corruption of blood, 367
3. For corruption of blood would produce a cesser of the estate-tail, 367
4. And by a cesser of the tail, the estate would be taken from the Vol. X.

crown and go to the remainder-man, contrary to the meaning of the act, which gives the land to the King, Page 367

Stat. 27 Hen. 8. cap. 10.

Statute of Uses, Page 423.

Chap. 24. Franchises.

Several franchises resumed, because derogatory to the prerogative, and tending to the delay of justice, 128
129

Stat. 32 Hen. 8. cap. 1.

Statute of Wills, Page 423, 425,
469, 532

Stat. 33 Hen. 8. cap. 9.

Plays.

1. Inflicts a penalty of 40s. per day for keeping a gaming-house, 336
2. The penalty may be recovered by indictment, though not one of the ways of proceeding directed by the statute, 336, 337

Chap. 20. Treason.

1. The first statute that ever gave leave to try a man in his absence, 341
2. Repealed by implication by stat. 1 & 2 P. & M. cap. 10. which leaves all trials to the course of the common law, *ibid.*

Stat. 5 & 6 Ed. 6. cap. 4.

Striking in the Church-Pard.

1. The offender *ipso facto* excommunicated, 65
2. Yet a precedent conviction held necessary, 65, 179

Stat. 1 & 2 P. & M. cap. 10.

Treason.

Stat. 33 Hen. 8. cap. 20.

Stat. 5 Eliz. cap. 4.

Labourers.

1. Give Justice of peace power to compel men to serve in husbandry, Page 263
2. Held by the equity of the statute, That they should likewise have power to give such servants redress as to their wages, though there be no express words in the act to that purpose, *ibid.*

Chap. 10. Apprentices.

1. Resolved *obiter*, That serving five years out of England, and two in England is enough to satisfy the statute, 70
2. A wife who has lived with her husband seven years, may continue the trade after his death, *ibid.*
3. Any person that has lived seven years with one using a trade, tho' not qualified to do so, may set up the trade himself, as well as if he had lived with one never so well qualified, 71

Stat. 23 Eliz. cap. 3.

Fines.

1. Designed to regulate, not annul fines, 43
2. Extends only to fines taken by *De-dimus*, *ibid.*
3. The date of the concord to be certified by the judge before whom the fine was levied, 42

4. Whether the fines declared void by this statute, are any otherwise void than as they are voidable by writ of error? Page 43, 44

Stat. 27 Eliz. cap. 8.

Error.

Writs of error into the Exchequer-Chamber given by this statute, 275

Chap. 12. Sheriffs.

1. Oaths appointed to be taken by the under-sheriff, 288
2. Whether acts done by one that executes the office of under-sheriff without taking these oaths be valid? 289, 290

Stat. 29 Eliz. cap. 4.

Sheriffs.

Of their fees for serving execution, 86

Stat. 31 Eliz. cap. 6.

Simony.

1. A simoniacal presentation void, 176, 177
2. And though institution or even induction follow such presentation, yet the church may be presented to without bringing a *Quare impedit*, 176, 177, 407
3. For the statute makes all void in the same manner as if the incumbent was naturally dead, 177
4. To an action brought for tithes a simoniacal contract is a good defence, 407

Stat. 1 Jac. 1. cap. 4.

Papists.

Papists.

1. Of the construction of the statute, Page 115, &c. 357, &c. 407, &c.
2. The end and design of it, and the reason why it was made, 406, 407
3. Disables persons brought up in Popish seminaries abroad, in respect of themselves only, but not their heirs, from inheriting or enjoying any lands, &c. during their non-conformity, 115
4. Inflicts penalties upon the officers of the ports that suffer them to pass, and upon the Master and mariners of the ship, 124
5. Whether lands may vest in Papists educated in foreign seminaries, notwithstanding the incapacity incurred by this act, so as to enable them to levy a fine, or suffer a common recovery? 114, &c. 357, &c. 407, &c.
6. Whether such Papists, upon conforming, are only freed from their incapacity for the future; or whether they shall then enjoy those estates their former incapacity kept from them? 116, 122, 411
7. Whether the crown, or the remainder-man (in case of an estate tail and no issue) shall have the mesne profits till conformity? 120, 123, 409
8. Whether persons disabled by this act, may purchase for the benefit of their heirs? 121, 363
9. Whether their disability is removed by a general pardon? 124, 365
10. Whether this act, or any part of it, was repealed by 3 Jac. 1. cap. 5. or by 3 Car. 1. cap. 2? 118, 122, 356, 357, 409

Chap. 15. Bankrupts.

1. Explanatory of Stat. 13 Eliz. cap. 7. Page 244
2. Debts owing to the bankrupt assignable to the creditors, 164
3. And the same remedy given the assignees for the recovery of such debts, as the bankrupt himself had, 246
4. Debts due to the wife of the bankrupt before coverture, within the statute, 244, 245
5. A deed made in trust for the advantage of the bankrupt, with design to defraud creditors, amounts to an act of bankruptcy, 493, 494

Stat. 3 Jac. 1. cap. 5.

Papists.

1. Made upon the occasion of the gunpowder treason, 118
2. Designed to lay Papists under severer penalties than before, 118, 122
3. Restrains convicted recusants from the practice of law, physick, &c. 118
4. Supplies several defects in statute, 1 Jac. 1. cap. 4. 122
5. Provides against sending children abroad any where; whereas by 1 Jac. 1. they were only restrained from being sent to Popish seminaries, 123
6. Gives a penalty to the informer, *ibid.*
7. Not said in 1 Jac. 1. who shall have the mesne profits of their estates, but *here* they are granted to the next of kin, 123, 409
8. This statute likewise disables Popish recusants convict to present to any benefices, and vests the right of presenting to such benefices in the

- Chancellor and Scholars* of the two universities respectively, Page 207
9. Whether the university of *Cambridge*, being incorporated by the name of Chancellor, *Masters* and scholars, may sue upon this act by the name of Chancellor and scholars? 207, 208

Stat. 3 *Car.* 1. cap. 2.

Papists.

1. Takes notice of 1 *Jac.* 1. cap. 4. as an act in force, and that ought to be put in execution, 118, 123, 124
2. Exceeds 1 *Jac.* 1. and 3 *Jac.* 1. both in the purview and the penalty, 123
3. Relates to estates already vested, 118

Chap. 8. Error.

1. Special bail to be put in by plaintiff in error of judgment upon debt, or contract for the payment of money, 281
2. Extends only to cases where the judgment does necessarily import a debt to be due; for otherwise delay not so prejudicial, 283
3. What cases have been adjudged out of the statute, see *Bail in Civil Cases* 10, 11, 12.

Chap. 13. Killing of Cones.

See stat. 22 & 23 *Car.* 2. cap. 25.

1. Relates only to warrens inclosed, 279
2. The summary way of proceeding by conviction before Justices not given by this statute, 279

Stat. 21 *Jac.* 1. cap. 3.

Monopolies.

1. Limits the time for which a grant may be made of a new invention to fourteen years, Page 131

Chap. 16. Statute of Limitations.

1. Not to be taken advantage of formerly, unless it was pleaded; but now the law is otherwise, 313
2. A bare acknowledgment of a debt will not amount to a new promise sufficient to prevent the operation of the statute, 314
3. But *I deny that I owe you any thing; prove it and I will pay you*, held sufficient, *ibid.*
4. If this statute be pleaded to an *Assumpsit* brought by an executor on a promise to the testator, no new promise to the executor can avoid the plea, 313, 314
5. Actions of *Assumpsit* not mentioned in the saving clause, 206
6. The saving clause not to be extended by equity, *ibid.*
7. *Where* held that the shutting up of the courts *tempore guerra* would not avoid the statute, *ibid.*

Stat. 13 *Car.* 2. sess. 2. cap. 1.

Qualification Act.

1. Corporation officers to receive the sacrament within a year before their election, 100, 173
2. Whether the offices of such as are not so qualified be void, or only voidable? 65, 100, 179
3. How the word *placed* may be interpreted in this statute, 177

Chap.

Chap. 2. *Process.*

1. Where after issue joined and any judgment had, there shall not need to be fifteen days between the *Tesse* and the return of the writ, Page 82

2. Of the construction of the statute, *ibid.*

Stat. 13 & 14 Car. 2. cap. 12.

Poor.

1. Any person becoming chargeable may be removed to the last *Parish* where he was legally settled, 81
2. But not to an extra-parochial place where there are no officers to receive him, *ibid.*
3. Nor to the parish where he lived before removing to the extra-parochial place, because not his *last* settlement, *ibid.*
4. Any poor person coming to settle on a tenement under the value of 10*l. per Ann.* removeable by two Justices within forty days after such coming, 431
5. A tenement of 10*l. per Ann.* will entitle to a settlement where the house is, though part of the land should lie in a different parish, 389
6. For the law presumes, That it is not probable, that one should become chargeable who has credit enough to get intrusted with the management of a farm of such value, *ibid.*
7. If a man takes several distinct tenements in different parishes, that in the whole amount to more than 10*l. per Ann.* yet he gains no settlement, if each of them singly is under that value, 390

VOL. X.

8. But persons coming to reside upon their own lands, though but 20*s. per Ann.* not removeable, Page 431

Stat. 22 & 23 Car. 2. cap. 10.

Statute of Distributions.

1. A feme-covert may sue singly upon this act in the Spiritual court, 63
2. The husband may release his wife's share of an intestate's estate, *ibid.*
3. But if it be not released by him, it is so much the wife's that she shall have it by survivorship, 64
4. A rule has obtained in equity, That the *Residuum* of a testator's estate not disposed of by his will, shall be divided according to this statute, 99

Chap. 25. *Killing of Conies.*

1. Extends to all warrens inclosed or not inclosed; for the words *though not inclosed* are not restrictive, 280
2. Gives the short way of conviction before Justices, *ibid.*

Stat. 29 Car. 2. cap. 3.

Statute of Frauds and Perjuries.

1. Whether the signing of three witnesses at three several times, in the presence of the testator, be a good execution of a will within this statute? 15
2. (N. B. it has been held good, See *Rep. of Cases in Equity* 259, &c.)
3. The time when any judgment is given must be marked on the roll, 325
4. And though the judgment, by being entered without continuances, may have relation to a preceding

5 U

term,

term, yet it shall not bind land but from the day so marked, *Page* 325

5. If this statute be not insisted on, Chancery will compel the performance of an agreement, though not in writing, 404

6. Not necessary that trusts relating to personal estate should be in writing, 405

Stat. 34 *Car.* 2. *cap.* 2.

Habeas Corpus Act.

1. Persons committed by *Warrant* for treason or felony, to be bailed, if not indicted the next term or sessions after their commitment, provided they enter their prayer the first week of the term, or first day of the sessions, to be brought to trial, 429

2. Resolved that such persons as stand committed by *Rule of Court*, are not intitled to claim the benefit of this act, *ibid.*

Stat. 1 *Jac.* 2. *cap.* 17.

Poor.

1. Notice in writing of coming to live in a parish, necessary to a settlement, 14
2. But payment of taxes, or exercising offices, upon the equity of the act, judged equivalent to notice in writing, *ibid.*

Stat. 1 *W. & M. sess.* 1. *cap.* 26.

Papists.

1. Record of the default a conviction of itself, 209
2. So that in pleading a conviction upon this statute, the special conclusion of *ideo convictus est* need not be used, *ibid.*

Stat. 2 *W. & M. sess.* 1. *cap.* 5.

Distresses.

1. Goods distrained for rent may be sold after notice left of the distress with the cause thereof, *Page* 265, 266
2. Notice to the lessee sufficient; for the owner of the goods may not be known, 266
3. In what manner the notice ought to be pleaded, in a justification under the statute, *ibid.*

Stat. 3 & 4 *W. & M. cap.* 10.

Deer-stealers.

1. Exceptions taken to a conviction upon this statute, 248
2. The conviction may be taken either by the Justices of the county where the fact is committed, or of that where the party is apprehended, 342
3. No particular form of proceeding prescribed, 249, 378
4. Only that the conviction be by oath of one credible witness, 378
5. Agreeable to the course of the common law, That the party should be summoned, 250
6. Whether the summons need be a personal summons? 342, 345
7. If the party do not appear upon summons, the Justice may proceed to conviction in his absence, 250, 341, &c. 378, &c.
8. But a Justice has no power to issue his warrant to compel the appearance of the party, 345, 381
9. Yet after conviction, the constable or other officer, or prosecutor himself has power to detain the offender (in case he be present) for fear of escape, 342
10. For

10. For want of sufficient distress, the punishment by this statute, is pillory and a year's imprisonment, *Page 341*

11. Judgment of the Justices final, *ibid.*

Chap. 11. 12002.

1. Of the reason and design of the statute, 14, 15
2. Settlement gained by executing any publick annual office, 14
3. Or by payment of taxes, 11, 14
4. But payment of a scavenger's rate, being a ward rate, adjudged no settlement, 14
5. And yet executing the office of a scavenger, would have been a settlement; *per Eyre*, 15
6. The warden of a borough intitled to a settlement in the parish where he lives during the exercise of his office, though not chosen by the parish, 13, &c.
7. Hiring for a year and service accordingly make a settlement, 15
8. And though a person hired for a year should not serve out the whole time; yet if he has served as long before such hiring as to make up a year's service in the whole, it has been adjudged sufficient to satisfy the meaning as well as the words of the act, 390
9. For one that is hired for a year's service is presumed to be of sufficient strength to maintain himself by his bodily labour, and consequently a person not likely to become chargeable, 15, 390

Chap. 14. Frauds.

1. In debt upon bond the heir may plead *Riens per descens*; and if it be found for the plaintiff, the jury shall then inquire of the value of the lands descended, 18

2. Whether the inquisition may be taken by any other jury besides *that* which tried the cause? *Page 19*

3. Whether a verdict that found the descent of sufficient lands to discharge the debt, should be deemed equivalent to an inquisition? *ibid.*

4. Or whether the verdict was void for uncertainty, because it did not appear whether the jury meant the legal or the equitable debt? 18,

5. The end designed by the act was to help the creditor in case of alienation, 19

6. And also the heir, by enabling him to plead *Riens per descens* without the risk of becoming liable to the payment of the whole debt, in case ever so little was found to descend, *ibid.*

Stat. 5 & 6 W. & M.

Certiorari.

1. Designed to discountenance the removing of suits by *Certiorari*, 194
2. If an indictment be removed by *Certiorari* from the sessions into B. R. the prosecutor shall have costs upon the conviction of the defendant, 193
3. Notwithstanding which, the prosecutor shall be allowed to be an evidence; because otherwise the removing of suits would be encouraged, and the intention of the act defeated, 194

Chap. 21. Coaches.

Usual with the commissioners of hackney coaches to convict upon this act without appearance, after a summons, 344

Stat. 8 & 9 W. 3. cap. 27.

Gaolers.

1. Gives an action of escape against the Marshal of the King's Bench, or the Warden of the Fleet, if they or their deputies refuse to produce a prisoner after a day's notice, *Page* 394
2. If no particular time of day be specified in the notice, the prisoner need not be produced till the close of the evening, 396, 397
3. Inferior officers of the prison not comprehended under the word *Deputy*, *ibid.*

Stat. 9 & 10 W. 3. cap. 11.

Boor.

1. Reason of making the act, 430, 431
2. No certificate man to gain a settlement, unless he take a tenement of 10 l. *per Ann.* or execute some annual office, 430
3. Held notwithstanding That a certificate man was settled by the descent of a copyhold upon his wife, though but 20 s. *per Ann.* *ibid.*

Chap. 15. Arbitration.

1. Submission to arbitration, to be made a rule of court, if the parties agree to have it so, 332
2. Affidavit to be made by a witness of the arbitration-bond, That such agreement was inserted in the condition of it, 332
3. If a witness refuses to make the affidavit, the court will compel him to it, rather than the statute should be eluded, 332, 333
4. The party may at pleasure resort to this new remedy given by the statute, even after judgment recovered upon the arbitration-bond, 333

Stat. 11 & 12 W. 3. cap. 4.

Papists.

1. Disables Papists (not conforming at 18) to take lands either by descent or purchase, *Page* 89, 90, 482
2. *Purchase* includes devise, 95, 234, 242, 483, 537
3. The surplus of lands devised to be sold for payment of debts and legacies, is a real interest within this act, 93, 234, 483, 537
4. And so are all *Profits out of Lands* arising from sale, as well as continuing profits, 96
5. So that Papists are disabled by this act, from charging their lands with portions for younger children of their own persuasion, 91, 94
6. Whether their lands may be devised to be sold for the payment of debts owing to Popish creditors? 91, 94, 236
7. Whether Papists that conform at 18, are capable of taking whatever lands were devised to them before they came to that age? 481, &c. 536, &c.
8. See different interpretations of the act by Lord Chancellor *Macclesfield*, and Lord Chancellor *King*, 485, 537

Stat. 1 Ann. cap. 8.

King and Queen.

1. Original writs not to abate upon the demise of the crown, 258
2. Extends to a *Scire facias* brought for the repeal of a patent, 355

Stat. 3 & 4 Ann. cap. 9.

Bills,

Bills, or Promissory Notes.

1. Promissory notes payable to *A.* or order, transferrable by indorsement, *Page 316*
2. The indorsee may maintain an action, as *A.* might have done before indorsement, *ibid.*

Stat. 4 & 5 *Ann. cap. 16.*

Amendment of the Law.

1. Enables the defendant in debt upon bond to plead payment, or to bring the money into court; but not to plead tender, refusal & *uncore prist*, 26
2. Such faults in form as would be cur'd by verdict, helped upon a general demurrer, 252
3. The defendant in any action, with leave of court, may plead several pleas, 280
4. But the court may not give him leave to plead and demur, 280, 281
5. Whether this extends to a defendant in error? 326
6. Writ of error shall not abate by the death of one of the plaintiffs in error, *ibid.*
7. Bail-bonds assignable under the hand and seal of the sheriff, 289
8. Whether this circumstance of the hand and seal makes the assignment a personal act in the sheriff, and such as cannot be performed by the under-sheriff? 289, 291
9. Whether the under-sheriff, though not particularly mentioned, be not included under those words of the act *or other officer taking bail*,? 288

VOL. X.

Chap. 17. Bankrupts.

1. Discharges bankrupts upon their conforming themselves to the statutes in that case provided, from all debts owing at the time of bankruptcy, *Page 160*
2. Debts contracted by the wife *dum sola*, discharged by the bankruptcy of the husband, 160, &c. 243, &c.
3. But an executor or administrator, is not discharged from the debts he owes as executor, &c. 161, 245
4. Bankrupts obliged to make a discovery of their estates upon oath, under the pain of felony, 164, 246

Stat. 5 *Ann. cap. 14.*

Preservation of the Game.

1. A person authorised by a Lord of a manor to kill game for his use, a qualification within this statute, 26
2. The offence in this statute is the keeping of dogs, engines, &c. 27
3. But *one* five pounds can be forfeited in the same name, *ibid.*

Stat. 7 *Ann. cap. 12.*

Ambassadors.

1. Declares the proceedings against the *Muscovite* Ambassador upon an arrest for debt null and void, 5
2. Settles the privileges of Ambassadors in respect of debt, *ibid.*

Stat 8 *Ann. cap. 18.*

Mise of Bread.

1. Whether a Justice of peace may proceed upon default? *Page* 213
2. Whether the three days allowed for information ought to be computed inclusively or exclusively? 212
3. A conviction upon this statute quashed for want of certainty in the charge, 155
4. Another conviction quashed by reason the evidence was not otherwise set forth than that the witness was sworn *de veritate præmissorum*, 213

Stat. 9 Ann. cap. 20.

Mandamus's.

1. Speeds the proceedings upon *Mandamus's*; but does not give any new *Mandamus* in cases where none would lie before, 54
2. The returns to *Mandamus's* to be kept to the same strictness as before, 108
3. A special provision in the act to secure men from double vexation, 55

Stat. 10 Ann. cap. 5.

Bankrupts.

1. A declaratory law, 246
2. It appears from this statute, That a debt due from the bankrupt and another is within stat. 4 & 5 *Ann. cap. 17.* *ibid.*

Stat. 12 Ann. sess. 1. cap. 18.

Pool.

- If the Master be a certificate man, the servant can gain no settlement, unless his Master does, 279

Summons.

1. *Where* it was held a person might be disfranchised without being summoned, because he lived out of town, and it was his duty to have attended, *Page* 343
2. Ordinarily sufficient if a summons be left at the usual place of the party's abode, 345

Superfedeas.

1. Writs that issue out of *B. R.* erroneously, are frequently superseded before the return, 352
2. Whether a *Superfedeas* can issue after execution without a Judge's hand? 103

Surrender.

- If copyhold lands are given by will to younger children, equity will compel the heir at law to surrender to them, 497

T.**Tail.**

1. An estate-tail results from an operation of law, 377
2. And is created on purpose to uphold and preserve the intention of the testator, which would otherwise be often defeated, *ibid.*
3. Devise to *J. S.* and the heir of his body passes an estate-tail, 374, 375
4. What the difference between an estate in tail and in fee chiefly consists in, 374
5. An estate-tail may be created by implication, 403
6. But intails by implication are never allowed of, but in support of the in-

intention of the testator, and in favour of the heir at law, Page 403

7. If lands are given to J. S. and the heirs males of his body, a daughter's son is not inheritable, because the title must be conveyed through all males, 415

8. An estate-tail upon failure of issue reverts to the donor and his heirs, 411

9. Remainder can never take place but upon the cesser of the estate-tail, 120, 366, 414, 415

10. If husband and wife be tenants in special tail, and the husband only levies a fine and dies, and the wife enters, she becomes tenant in tail again; though the entail cannot descend, because the issue is barred by the father's fine, 412, 413

11. In what other case an estate-tail may cease for a time and rise again, 414

12. If *cestuy que Trust* in tail suffers a common recovery, or levies a fine, it will bar the entail in equity, 514

13. Where the issue in tail is not compellable in Chancery to perfect the defective assurance of his ancestor, 469, 476, 478

14. Entailed land was not forfeited for treason before stat. 26 Hen. 8. cap. 13. but was preserved to the children, 121

14. Where the attainder of a tenant in tail was held to work no corruption of blood, and why, 367

Term of Years.

A term will begin sometimes in equity, before it does in law, 435

Time.

If an act be to be performed on a certain day, and no particular time appointed for the doing it, the law

intends the last hour of the day to be the time of performance, Page

396

Title.

1. Though the defendant has no title, yet that will not avail the plaintiff, except he can make out a good one in himself, 415

Town-Clerk.

An office for life, unless restrained by charter or prescription, 147

Trade.

1. Bond conditioned to forbear the exercise of a trade, during a certain time, and in a certain place, adjudged good, 27, 85, 130

2. But if it do not appear in the condition of the bond, to have been entered into upon a just and valuable consideration, it will be void, 130, 136

3. So likewise if the breach of the condition does not apparently tend to the damage of the obligee, the restraint is void, 133, 135

4. Or if it be a general restraint, 28, 131, 132

5. Yet a perpetual restraint in a particular place may be good, 132, 135

6. If it be a total restraint in all places for a certain time, *quære*, 85, 137

7. Of the difference taken between a bond and a promise, 27, 85, 130, 136, &c.

8. Of restraints upon trade by by-laws, See *By-Laws*.

9. Of restraints by custom, see *Custom*.

10. Master of a ship dies in a trading voyage, and his successor trades with his effects. Decreed the successor should be considered as a trustee, and account for the profit with reasonable deductions for labour and skill, 20

11. If

11. If the successor had lost his predecessor's money in trade by misfortune, and not through want of care, the counsel said he would not have been chargeable, *Page 20*
12. Yet ordinarily in case a trustee trades with money in his hands without authority, the loss shall be at his own peril, though the profit must be accounted for, *21*
13. A power to place out children's fortunes to interest, or other way of improvement, must be understood exclusive of trade, *495*

Traverse.

1. Whatever is necessarily supposed in a plea, may as well be traversed as if it was expressed, *302*
2. The defendant in transitory actions cannot traverse the time and place alledged in the plaintiff's declaration, without a special justification, *253*
3. Where the King may take issue upon the defendant's traverse, *297, 298*
4. And where not, *211, 212, 296, &c.*
5. And in what case he is bound to do it, *298*

Treason.

1. Levying war to pull down inclosures, bawdy-houses, &c. is treasonable, *322*
2. Promise of pardon no objection to an evidence in the case of treason, *321, 322*

Trespase.

1. A possessory right only, without property, sufficient to maintain an action of trespass, *25, 37*
2. But without possession trespass not maintainable, *141*
3. Trespass is a formed action, *140*

4. Declaration in trespass *tres fecit terra fregit, &c.* adjudged naught upon error, *Page 140*
5. Though there be no fence, yet the declaration must be *clausum fregit*, for every man's ground is fenced in the eye of the law, *ibid.*
6. Death of one defendant will not abate the action, unless it be pleaded that he died *ante impetrationem brevis*, *251*

Trial.

1. The granting new trials began about the year 1652, *202*
2. Grantable as well for a fault in the judge as jury, in causes tried at *Nisi prius*, *202, 203*
3. But not for the mistake of counsel, though the cause was lost for want of their insisting upon a material point of law, when stirred, *ibid.*
4. Yet Lord Chief Justice Parker thought, if the party had no other remedy, a new trial ought to be granted; unless when the point is not only not insisted upon, but expressly waved by the counsel, *ibid.*
5. A bill of exceptions prayed at a trial at bar, *48*

Trust and Trustee.

1. As sure a remedy for a breach of trust in Chancery, as for any legal right in court of law, *234, 235*
2. If a trustee is impowed to put money out to interest, he is accountable for interest, though he should let it lie by him, and make none, *21*
3. If an estate is devised to trustees to be sold, yet the trustees are not obliged to sell it, notwithstanding the positive directions of the testator, as long as *Cestui que Trust* is satisfied without it, *235, 237*
4. Bond

4. Bond conditioned for the payment of so much money to *A.* *A.* assigning over to the obligor such a judgment against *B.* If the money be paid, and no judgment assigned, *A.* becomes a trustee in equity for the judgment, Page 223

5. *A.* buys 990*l.* *South-Sea* stock, and gets it transferred to *B.* some time after, *B.* mortgages 1000*l.* then stock to the company, and sells out all the rest that he had remaining in his name, excepting only 500*l.* The stock rising, *A.* desires to have the trust-stock transferred to him. *B.* transfers 500*l.* and promises to be accountable for the rest. Upon the fall of the stock, *A.* brings his bill for the value of the stock when sold by the defendant, or at the time the transfer was requested. Decreed the defendant should be deemed not to have sold, but mortgaged the trust-stock; and that he was accountable to the plaintiff only for stock and dividends. Note, *A.* never sold the 500*l.* that was transferred, 498, &c.

6. What trusts shall be deemed void and fraudulent *quoad* creditors; and what not, 247, 489, &c.

7. If a man articles to sell lands, and recovers damages against the vendee for non-performance of his contract; Whether by this recovery at law, the vendor shall cease to be a trustee in equity for the vendee, 506

Variance.

1. Writs of error directed to *Thom. Dom. Trevor* quashed, because the Vol. X.

return was by *Thom. Trevor Mil*, Page 283, 285

2. Record described in the writ of error was of a trespass committed by 31 persons, the record returned was of a trespass by 32, and held no variance, 368, 369

3. That shall not be variance, which may be helped by any construction the rules of language will admit of, 368

Venire facias & Assne.

1. If the *Venire* is made returnable upon a day certain, when it ought to have been returnable upon one of the common return days, it is a discontinuance, and not helped by statute where the King is party, 310

2. A new *Venire* shall be awarded when the entry to the first is *Vicecomes non misit breve*, *ibid.*

Verdict.

1. The court will make any intendment to support a verdict rather than it should be void, 301

2. Improper words aided by verdict, 185

3. If the issue be material, defects in pleading cured by verdict, 230

4. A defective declaration may be helped by verdict, 145, 210

5. Because it is to be supposed That the verdict could not have been found, unless there had been evidence given at the trial, of that matter wherein the pleading was defective, 229, 300

6. As where a grant of a thing is alleged, which in its own nature could not be granted otherwise than by deed, if the jury find the grant, it must be supposed evidence was given sufficient to prove the deed, 301

5 Y

7. Where

U
7. Where bad and defective pleadings were not aided by verdict, Page 301

8. Where variance between the writ and the count was not helped by a verdict, 69, 70

9. If the jury find what is no part of the issue, it is a void finding, 300

Villains.

Villains took lands for the benefit of their Lords, 122

Under-Sheriff.

1. All ministerial acts done by the under-sheriff, of the same authority as if done by the sheriff himself, 288

2. If a statute appoints an act to be done by the sheriff, and prescribes no particular manner for the doing it, that makes it necessary to be a personal act, it may be performed by the under-sheriff though he be not mentioned in the statute, 290

3. An under-sheriff, though not named, is included in several acts of parliament, by virtue of his office, 289

Universities.

1. Vice-Chancellor of Cambridge may claim consuance of the pleas, where any members of the university are defendants, by virtue of a charter granted by Queen Elizabeth, 126

2. This charter being confirmed by act of parliament, gives power to proceed *secundum legem & consuetudinem universitatis*, *ibid.*

3. Claim of consuance too late after imparlance, notwithstanding the exclusive words of the charter, 129, 130

Use, or Uses.

1. Where a covenant to stand seised to the uses declared in marriage articles, was decreed to be no conveyance, Page 436, &c.

2. In case of a conveyance by way of use upon condition of the payment of such a sum at such a day, the heir may pay the money if the ancestor die before the day, 421, 424

Usury.

1. Where an usurious contract was held good in favour of an innocent person, 449

W.

Warrant.

1. Commitment by rule of court, no commitment by Warrant within the Habeas Corpus act, 429

2. The species of treason need not be expressed in the warrant; because process the same in one sort of treason, as in another, 334

Warranty.

1. A collateral warranty was one of the hardest and most cruel points of the common law, 3, 4

2. Warranty in the nature of it, imports as well warranty of the property as possession, 143

3. Covenant may be brought upon it without shewing any eviction, 142

Wills.

1. Nuncupative wills to be put in writing, within six days after their making, 405

2. Before

2. Before the statute of frauds, not necessary for a will to be under the hand of the testator, sufficient by stat. 32 Hen. 8. if reduced to writing by his direction, Page 469

3. The same will is often proved in both courts, viz. temporal and spiritual, 386

4. Because proof in the one court establishes it for lands, the other for chattels only, *ibid.*

5. in the interpretation of wills, the intention of the testator ought to be supported as much as possible, 502, 523

6. And Judges have been commended for being *astuti* in finding out ways to do so, consistent with the rules of law, 502

7. Great latitude of construction to be allowed in the words of a will, 420, 523

8. Because the law supposes it to be made when a man is *inops consilii*, 422, 423

9. If the intention of the testator be plain, an estate in fee or in tail shall pass by such words in a will, as would not have been sufficient to have conveyed those estates by deed, 46, 523

10. If a will refers to any writing, it is as well as if the writing was inserted *verbatim*, 99

11. How far parol proof may be admitted to explain a will, 99, 100

12. One adds a codicil to his will with these words, *I do hereby revoke that part of my will wherein I make A, B, and C, three of my trustees.* Decreed That no part of the will was revoked, but barely the names of those three trustees, 520, &c.

13. Where a will cancelled upon a false supposition, was set up again in equity, 467

14. The doctrine of the republication of wills, Page 96, &c.

15. The making a codicil, *quatenus* a codicil, will not amount to a new publication, 98

16. Nor the inserting a new legacy, or another executor; and *this* before the statute of frauds, 97

17. Whether a parol declaration would amount to a new publication before that statute? 98

18. Whether the same forms be not necessary *now*, since that statute, to the republishing of a will, as to the first making? *ibid.*

19. A will stood revoked as to the real but not the personal estate; when the testator (having said the day before, he designed to republish his will) brings his will in one hand, and a codicil in the other, and says, *This is my will, and this I design as a codicil to my will*; and then the codicil was duly executed according to the statute of frauds and perjuries; Whether *this* amounts to a republication, the will itself being neither read nor executed as the statute requires? 96, &c.

Witnesses.

1. It is a principle of the common law, That evidence shall be given by persons disinterested, 193

2. Yet in some criminal cases interested persons are allowed to be witnesses by reason of necessity, 193, 194

3. They who produce a witness may examine him in chief only; but the party against whom he is produced, may examine him upon a *Voir dire*, whether he be concerned in interest, 151

4. But in case other evidence be offered to prove him interested, then the

- the witness himself shall not be examined upon a *Voir dire*, Page 193
5. No one shall be allowed to give evidence about any matter in favour of the hundred to which he belongs, 150
 6. The same though he be so poor at present as to pay no taxes, for he may hope to become rich, *ibid.*
 7. Though a witness is not immediately concerned in the event of a cause, yet if he be any way interested in the question upon which the cause depends, it is a sufficient objection to his evidence, 292
 8. As where an action is brought by a commoner for his right of commoning, no person that claims a right of common upon the same title, may be allowed for a witness, *ibid.*
 9. So when an action was brought against *A.* for a quantity of stockings, and *A.* pleaded, That it was not he but *B.* who bought them, and sent them to *France* in the way of trade: *B.* was not permitted to swear himself to be the buyer, because upon that question depended the right to the profit which had been made of the stockings, 291, 292
 10. A witness being brought to establish a charter, his evidence was objected to by reason of his being a mortgagee under the corporation, as was inferred from an answer of his to a bill in Chancery; but this answer being ambiguous, the court was of opinion he should be admitted to explain his answer, 151
 11. The evidence of bawds is rejected in all cases by the Spiritual Court, as infamous persons, 385
 12. Whoever subscribes his name as a witness to any thing, does thereby undertake to give his evidence when

it shall be wanted, and if he refuses, the court will compel him to it,

Page 333

Words actionable at Law, or not.

1. Actions for words of no great antiquity, 197
2. Precedents in this kind of actions, not of the same authority as in other actions; because words alter their signification, *ibid.*
3. These actions were at first so far discountenanced, as that whenever the words were capable of two constructions, the court always took them *mitiori sensu*, *ibid.*
4. But the rule that now prevails is to take them in the most natural sense, and as they must have been understood by the persons to whom they were spoken, 198
5. The reason of this different practice now and formerly, 197, 198
6. No action lies for such sort of words as *Whore*, *Bawd*, &c. 385
7. Words that hurt the credit of tradesmen are actionable, 111
8. *You are a soldier, I saw You in your red coat doing duty, your word is not to be taken*, spoken of an upholster, held actionable; because implying a design to defraud his creditors, by reason that a soldier is a privileged person, *ibid.*
9. *Two dyers are gone off, and for ought I know, H. will do so too within this time twelve-month*, actionable, 196, &c.
10. Where an action was brought for these words, *broken, run away, and will never return again*, and the court divided, 197
11. *H. got a witness to forswear himself in such a cause, you or be hired one B. to forswear himself*, actionable

able even if *B.* did not forswear himself, Page 196, &c.

12. If one say *A.* or *B.* did, &c. either *A.* or *B.* may bring an action, with an averment That neither of them did, &c. 198

Words punishable in the Spiritual Court, or not.

1. *You are a Whore, or you are a Bawd,* are words punishable in the Spiritual court, 385
2. *But you keep a bawdy-house* not punishable there; because punishable by indictment, *ibid.*

Words indictable, or not.

1. Words not indictable unless they have a direct and immediate tendency (and not by construction or implication) to a breach of the peace, 186
2. Calling a Justice of Peace (in his absence) *Ass, Fool, and Coxcomb* for making such a Warrant, held not indictable, 186
3. Saying of a Justice of Peace, *That he would judge in any cause brought before him, according to his affection,* held not indictable, 187
4. Saying of a Justice of Peace, *He deserves to be hanged for making such a numscull order,* held not indictable, *ibid.*
5. Laying his hand upon his sword and saying, *If it was not assize-time, I would not take such language from you,* held no assault, *ibid.*
6. One was indicted for saying to Justices at their sessions, when brought before them by warrant, *This is no Justice of Peace's business, you shall not try this matter; have a care what you do, I have blood in me; If I had you in another place.* Judg-

VOL. X.

ment arrested, because the words were not indictable; as not carrying with them any necessary intentment of a challenge, or intent to break the peace, especially when spoken by a wheelright, Page 186,

187

7. *Where* these words, *You lie, and I will maintain it with my life,* written in a letter to a Lord, were held punishable in the Star-Chamber,

187

Writs.

1. Judicial writs what, 259
2. Defects in form may abate original, but not judicial writs, 270
3. If judicial writs issue out that are not warranted by the record, they must be quashed, 306
4. Death of the plaintiff abates the writ, or suit, 258
5. By the common law, no difference in this respect, between the King and the subject, *ibid.*
6. But by the stat. 1 Ann. cap. 8. no original writ will abate upon the demise of the crown, *ibid.*
7. Formerly a writ of error would have abated by the death of one of the plaintiffs in error, 326
8. But since stat. 4 & 5 Ann. the law is adjudged to be otherwise, *ibid.*
9. Writ of error must be directed to the Chief Justice by his natural name, and not by his name of office; and the reason why, 283, 284
10. Writ of error directed to *Thom. Flemming Capital Justice ad placita*, quashed; because *coram nobis tenend. assignat* omitted, 285
11. Exception taken to a writ of error for calling the writ *quod permittat* by the name of *quare impedit*, over-ruled; because though

5 Z

this

W

W

this name (*quare impedit*) had never been used before in writs of error, yet the mistake having long prevailed in judicial writs and acts of parliament, it was become a legal name, Page 309, 311

12. Exception taken to the writ in an appeal of murder, That the *t* in the word *appellat* was turned up, 86

13. In an action of debt, if two sums be demanded by the writ when only one is due, Whether a release may

be entered, for *that* which is not due without falsifying the writ?

Page 305

14. Where the variance between the writ and the declaration is incurable; and where not, 69, 79, 210

15. Where a *Mandamus* to restore a man to his office is called a writ of restitution, 173

16. Whether his election to the office be an essential part of such a writ? 174, 176

PH
MVSEVM
BRITANNICVM

F I N I S

PH
MVSEVM
BRITANNICVM

ERRATA.

Page 39, l. 2, for *Shorer* and *Shorer*, read *Lingen* and *Souroy*. P. 61, l. 24, for they are not, read they are. P. 73, l. 10, for power, read uses. P. 73, l. 12, for revoked, read executed. P. 99, l. 4, for could, read should. P. 117, l. 22, for Hobart 107, read Hobart 157. P. 141, l. 14, for Moore 442, read Moor 422. P. 155, l. 1, for 20 Anne, read 8 Anne. Margin, p. 161, l. 6, for Nat. Brev. read Abr. Margin, p. 173, l. 10, for 23 Car. 2, read 13 Car. 2. P. 205, l. 28, for months, read years. P. 239, l. 4, for persons, read Papists. P. 308, l. 22, for reasons, read Respons. P. 326, l. 1, for 362, read 26. Margin, p. 334, l. 21, for 93, &c. read 96, &c. P. 357, l. 2, for 1 Jac. read 3 Car. Margin, p. 394, l. 5, for 26 sect. 8, read 27 sect. 9. P. 416, l. 28, for husband, read father-in-law. P. 420, l. 1, for 120, read 220. Margin, p. 422, l. ult. for 220, read 420. P. 515, l. 15, for her brother, read her son. Margin, p. 524, l. 1, for demise, read devile.